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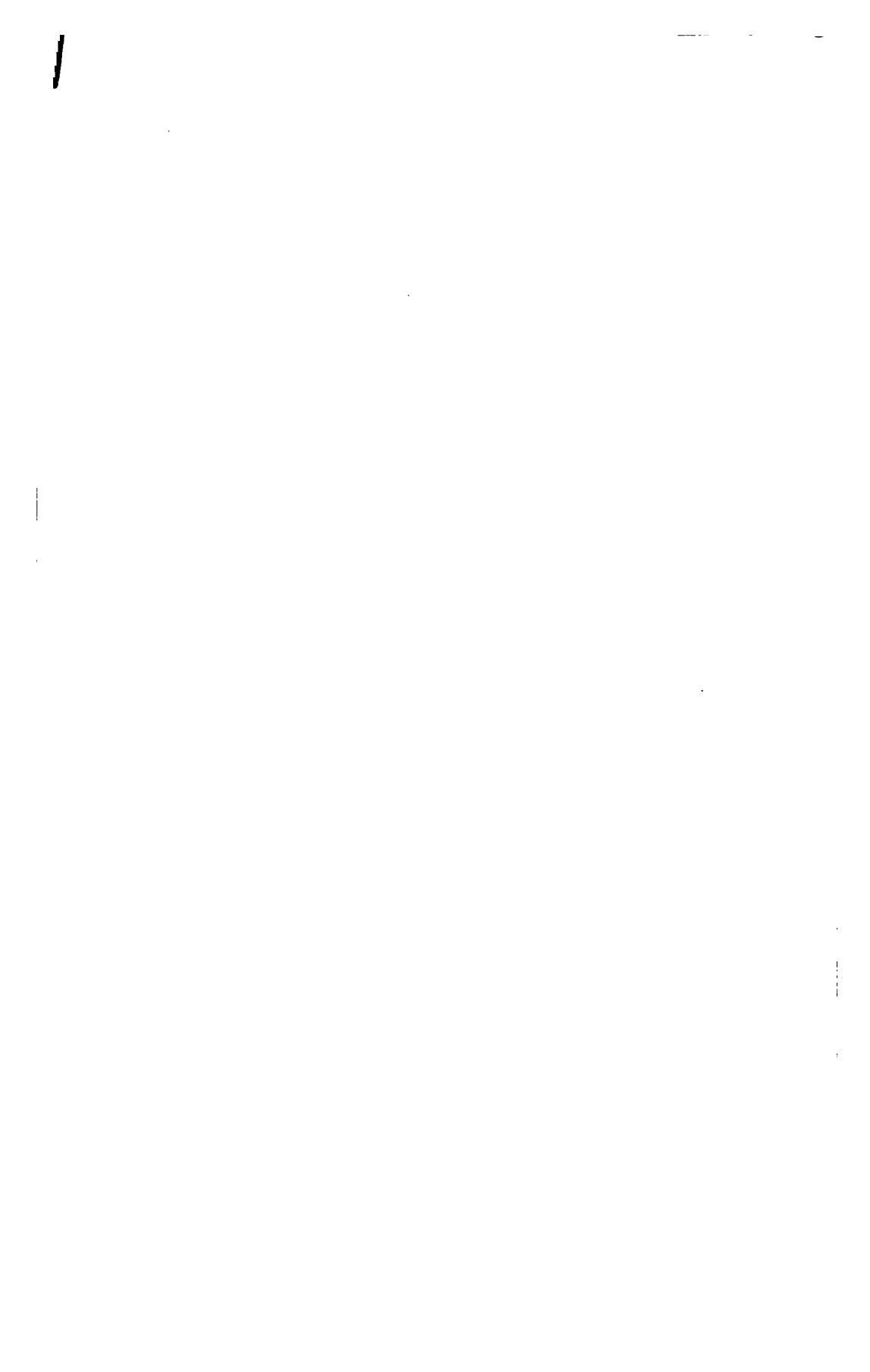
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MCCARTY'S
CIVIL PROCEDURE REPORTS
CONTAINING CASES UNDER THE
Code of Civil Procedure
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
GEORGE D. MCCARTY,
OF THE NEW YORK BAR.

*With a Reference to the Civil Practice Acts and the Amendments
to the Code of Civil Procedure contained in the
Session Laws of each year.*

VOLUME II.

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DAVIS AND ANO., APPELLANTS, v. CLARK,
EXECUTOR, RESPONDENT.

COURT OF APPEALS; OCTOBER, 1881.

§§ 1337, 2586.

Appeal to court of appeals from surrogates' courts.—Jurisdiction of court of appeals to consider evidence upon, to what limited.—When question of fact arising upon conflicting evidence cannot be determined in court of appeals.—The "appellate court," in section 2586, has reference to the supreme court only.

Prior to the Code of Civil Procedure, the decision of a surrogate upon a question of fact arising on the final settlement of an executor's accounts, was reviewable in the court of appeals upon all the evidence, and the decision could be reversed if against the weight of evidence. But now, in such a case, the court of appeals has jurisdiction to consider the testimony, only with a view of seeing if there be any evidence to sustain the decision.^[1]

By section 1337 of the Code, a question of fact arising upon conflicting evidence cannot be determined upon an appeal to the court of appeals, unless special provision for the determination of such question is made by law.^{[2]*} No such special provision has been made in relation to

* Mr. Throop, in a note to section 1337 of his edition of the Code (1880), says: * * * "The doctrine that the court of appeals, as an appellate court, possessing no original jurisdiction, is confined to questions of law, appears to result from general principles rather than an express provision of the statute. *Esterley v. Cole*, 8 *Comst.* (8 N. Y.), 502, particularly, *per Bronson*, Ch. J., pp. 504, 505, and cases cited. The next section preserves the qualified power of the court to review the facts, upon appeal from an order granting a new trial. Chapters 17 (*sic*) [chap. 16; see § 2140] and 18 of this Code, enacted in 1880, provide for a review of the facts,

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Davis v. Clark.

appeals to the court of appeals from the decrees or orders of a surrogate's court, involving such a question of fact; and section 2586, in regard to the power of the appellate court to decide questions of fact, has reference to the supreme court only. ['] [']

(Decided November 22, 1881.)

Appeal from an order of the general term of the supreme court, fourth department, affirming a decree of the surrogate of Livingston county.

The opinion sufficiently states the facts.

H. H. Woodward, for appellants.

E. A. Nash, for respondent :

Urged that the "appellate court," referred to in section 2586, was the general term of the supreme court; and that, on the authority of Mr. Throop's note, that

upon appeals in special proceedings commenced by State writ, and from decrees of surrogates. There seems to be no other case, where this court should be burdened, upon an appeal embraced in this section, with 'a question of fact arising upon conflicting evidence.' " * * *

Davis *v.* Clark, *supra*, limits the provisions of chapter 18 (§ 2586) in regard to review of a question of fact to the general term of the supreme court; and chapter 16 does not contain any special provision for the determination of a disputed question of fact upon appeal to the court of appeals; and, as may be gathered from Mr. Throop's note, *supra*, the only cases where a conflicting question of fact can be reviewed by that court, under section 1887, and the manner in which it must be presented, are described in section 1888;— * * * "appeals from a judgment, reversing a judgment entered upon a referee's report, or a decision of the court, upon a trial without a jury; or from an order granting a new trial, upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears, in the body of the judgment or order appealed from. In that case, the court of appeals must review the determination of the general term of the court below, upon the questions of fact, as well as the questions of law."

For recent cases under sections 1887 and 1888, see *In the Matter of S.*, 85 N. Y. 630; *Goodwin v. Conklin*, 85 *Id.* 21; *Van Wyck v. Watters*, 81 *Id.* 852; *Weyer v. Beach*, 79 *Id.* 409; *Van Tassel v. Wood*, 76 *Id.* 614; *Lawrence v. Farley*, 78 *Id.* 187.

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section was framed to conform to the former practice, and cited Godfrey *v.* Moser, 66 N. Y. 250; Hay *v.* Miller, 70 N. Y. 112, 118; Stilwell *v.* Mutual Life Ins. Co. 72 N. Y. 385.

EARL, J.—This appeal brings before us for review the decree made by the surrogate of Livingston county, upon the final accounting of William S. Clark, executor of Lauren B. Godfrey, deceased. Upon such accounting, the appellants objected to a credit of \$1,000, claimed by the executor to have been paid by him on the 10th of March, 1877, upon the order of Alida J. Davis, a legatee, and the principal contest before the surrogate related to that credit.

[¹] Prior to the Code of Civil Procedure, the decisions of surrogates in such cases were reviewable in this court upon all the evidence (*Kyle v. Kyle*, 67 N. Y. 400), and this court could reverse the decision of a surrogate if against the weight of evidence; but now this court has jurisdiction only to consider the evidence with the view of seeing if there is any evidence sufficient to sustain the surrogate's decision.

[²] Section 1337 of the Code of Civil Procedure provides that, "a question of fact arising upon conflicting evidence, cannot be determined" upon an appeal to this court, unless special provision for

[³] the determination thereof is made by law. No such special provision as to appeals of this character has been made.

[⁴] Section 2586, which provides that, "where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee,"—has reference only to appeals from surrogates' decrees or orders to the supreme court.

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We have, therefore, only to inquire whether there was any evidence in this case sufficient to authorize the allowance of the credit claimed.

Alida J. Davis gave two orders on the respondent to pay to her father-in-law, M. C. Davis, moneys due her, one for \$3,500, and the other for \$1,500. The respondent claimed that he paid to M. C. Davis \$1,000, on the 2d of March, 1877, and for that payment he held the receipt of M. C. Davis, acknowledged to be genuine, of that date, as follows:—

“Received of William S. Clark, one thousand dollars to apply on note, per order A. J. Davis.

M. C. DAVIS.”

He also claimed, that on the tenth day of the same March he paid another sum of \$1,000, for which he also produced a receipt, also acknowledged to be genuine, signed by M. C. Davis, which was indorsed on the back of the order for \$1,500, as follows:—

“Received of William S. Clark, on the within order, one thousand dollars. M. C. Davis, Mendon, March 10, 1877.”

This receipt was written lengthwise across the back of the order, and the body of it was in the handwriting of Clark. Below it, on the back of the same order, was a receipt for \$706, the balance of the order, in the handwriting of M. C. Davis.

The claim of the appellants is, that there was but one payment of \$1,000; that that was made by check on the 2d of March, which was presented at the bank and paid to Davis on the 10th of March, and that the receipt for it was written on the back of the order on the 31st of March, when the balance of the order was paid, and the other receipt written thereon. Davis testified positively, that he never received but one payment, but he does not explain in a manner entirely

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satisfactory how, within such a brief period of time, he came to give two receipts, somewhat different in form, for the same payment. It is, however, difficult to see how he could be mistaken, and his evidence is quite direct and convincing. On the other hand, Clark testified that he made the two payments, naming the place where he made them ; that he always took receipts when he made payments ; that unless he made the payment of \$1,000 on the 10th of March, as claimed by him, that sum would be missing, for which he could not otherwise account, and that the payment of both sums was entered in his account book. It is true, that he testified that he had no particular memory of the payments aside from his receipts and account book ; yet, there was enough in his evidence, fortified by the receipts, to create a conflict. It was the province of the courts below, not only to weigh the direct and positive evidence bearing upon the disputed fact, but to consider all the surrounding circumstances, and to draw the inferences where different inferences could be drawn.

Without, therefore, referring to the evidence at length, or attempting to answer in detail, the forcible argument make on behalf of the appellants, we cannot resist the conclusion, that the surrogate's decree was so far based upon conflicting evidence as to be beyond our interference.

The decree should be affirmed.

All concurred.

Yamato Trading Co. v. Brown.

**YAMATO TRADING CO., RESPONDENT, *v.* BROWN
AND ANO.; BROWN, APPELLANT.**

**SUPREME COURT, FIRST DEPARTMENT; GENERAL TERM,
MAY, 1882.**

§§ 870, 880.

Examination of party before trial. — *When order for, unauthorized.* — *To what rules such examination is subject.* — *Cannot be had to compel witness to accuse himself of a crime or misdemeanor, or to expose himself to a penalty or forfeiture.*

An order for the examination of a party before trial is unauthorized, where the entire object of the examination is to show by the witness that he has procured goods by false pretenses, for which he is liable to indictment.

Such an examination is subject to the same rules as if the witness were examined upon the trial; and, therefore, he cannot be required to submit thereto, when it would, through his answers, tend to make him accuse himself of a crime or misdemeanor, or to expose him to a penalty or forfeiture, or add a link to a chain of testimony leading to such a result.*

Phoenix v. Dupuy (2 Abb. N. C. 146), and *Burbank v. Reed* † (11 W. Dig. 576), followed.

(Decided May 27, 1882.)

* For a collection of cases to the same effect as *Yamato Trading Co. v. Brown*, *supra*, both under the bill of discovery and the Codes, see 1 Civ. Pro. R., 75, 91, "Note on Examination before Trial;" and see, also, *Russ v. Campbell*, 1 Civ. Pro. R. 41, and *Walker v. Dunlevy*, here reported:

N. Y. Marine Court; Special Term, May, 1882.

WALKER v. DUNLEVY AND ANO.

§§ 870, 880.

Examination of party before trial. — *Order for, should be denied, if it appears that the examination would, of necessity, compel witness to invoke protection of the court to secure his immunity from criminalizing himself, or when the*

† For the opinion in *Burbank v. Reed*, see 1 Civ. Pro. R. 42, note.

Yamato Trading Co. v. Brown.

Appeal by defendant Brown from an order of the special term, denying a motion to vacate an order for his examination as a party before trial.

The opinion states the facts.

Arthur R. Robertson (Robertson, Harmon & Cuppia, attorneys), for appellant:

Cited on the point here decided, *Elmore v. Hyde*, 2 Abb. N. C. 129; *Greenly. on Ev.* § 82; *Glenney v. Stedwell*, 64 N. Y. 120; *Phoenix v. Dupuy*, 2 Abb. N. C. 146; S. C., 7 *Daly*, 228; 4 W. Dig. 418; *Burbank v. Reed*, 11 W. Dig. 576; *McIntyre v. Mancius*, 16 Johns. 592; *Brown v. Swan*, 10 Pet. 501.

Taylor & Parker, for respondent.

By the Court.—*DANIELS, J.*—The action has been brought to recover a quantity of raw silk as the prop-

testimony of witness would have the effect of furnishing a link in the chain of proof that he has committed a criminal offense.—The court is bound to take notice of the object of the examination, and the order is discretionary; and, where the only issue is the criminal act of the witness, it should be denied.—Phania v. Dupuy (3 Abb. N. C. 146 [S. C. 7 Daly, 228; 58 How. 158]), approved; Corbett v. De Comeau (54 How. 506 [S. C. 4 Abb. N. C. 252]), disapproved.

Motion by defendant, Dunlevey, to vacate an order for his examination as a party before trial.

This action was brought to recover the value of goods and merchandise sold and delivered to the defendant, Dunlevey, on the faith of certain representations made by him as to his financial responsibility, which representations, it was alleged on information and belief, were false and fraudulent, the defendant knowingly, at the time of such sale and delivery, being wholly insolvent and unable to pay therefor.

The order was granted after issue joined, and the affidavit upon which it was based, after setting forth the nature of the action, described the object of the examination to be the ascertaining of, "whether the defendant, at the time the goods and merchandise mentioned in the complaint were sold and delivered to him, was solvent and able to pay his debts as represented by him to deponent, when said goods and merchandise were

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erty of the plaintiff, and wrongfully taken and detained by the defendant.

The silk had in form been sold and delivered by the plaintiff to the defendant upon credit, and the action is prosecuted for the recovery of its possession, because of fraudulent representations alleged to have been made by the defendant concerning his circumstances and his ability to pay for it. Proof of these facts appears to be necessary in order to avoid the credit, and in that manner to entitle plaintiff to recover the property. And it is for the purpose of obtaining that proof that the order has been made for the examination of the defendant. In the affidavit, it is stated, that the plaintiff intends to show by Brown, on his examination, that he was insolvent at the time when he obtained the silk, and in that manner to render it evident that his representations and

purchased," and then averred, that the "matters above set forth as to the solvency of the defendant are solely within the knowledge of the defendant, and that the same can only be obtained by deponent by securing his said examination, and that this deponent can only, as he is informed by his counsel, prosecute this action by proving the matters above set forth, and that it is essential, and necessary and material that the said matters above set forth should be secured by deponent before this action is tried," etc., etc.

In opposition to the examination, it was urged, in effect, that its whole tendency was to compel the defendant to disclose whether or not he had been guilty of the criminal offense of obtaining goods under false pretenses, which, if true, would render him liable to indictment; that there was no material part of the proposed examination that did not tend to compel the witness to criminate himself, and that to secure his immunity as a witness, the defendant would, at every stage of the examination, be obliged to seek the protection of the court.

Samuel Keeler, for defendant.

Abram Kling, for plaintiff.

HAWES, J.—All parties substantially agree that a defendant can decline to answer a question which will criminate him; and I think that if it appear, that such an examination before trial would, of necessity, compel a party to invoke the protection of the court, then the order should be

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statements as to his financial standing and solvency were not only untrue, but were known to be so by him ; that the plaintiff has no other means known to it whereby it can show the true financial condition, and the assets and liabilities of Brown at the time when he purchased the goods ; that the examination of Brown as to such facts, and to show his insolvency, was actually necessary for the benefit of the plaintiff on the trial of this action ; and it was further proposed to show by him and his books and papers, that his liabilities exceeded his assets, and he had been in that condition for a long time prior to obtaining possession of the goods ; and that he stated and represented himself to be worth many thousand dollars for the purpose of inducing, and thereby did induce, the plaintiff to deliver the goods to him.

denied. The ruling in *Phoenix v. Dupuy* (2 Abb. N. C. 148), is clearly in accordance with the best practice. The examination in this case, on its face, is ordered merely to determine the solvency or insolvency of the defendant, and it may well be said that insolvency is not in itself criminal, and the court would not interfere for the protection of the party from the discovery of that fact. But such testimony would be subject to the objection of immateriality, if not taken in view of the complaint which charges fraud in the representation as to his solvency. In other words, such evidence is good only so far as it furnishes a link in the chain of proof that defendant has committed a crime; and any one question which has that effect is as objectionable as any other; for, if the principle is correct in any phase of the case, it is correct in all phases. The proof as adduced, would lead only in one direction. The court is bound to take notice of the objects of the examination, and the only issue in the case at bar is the criminal act of the defendant, and in view of what I deem the well-settled rule, this order, which is discretionary in its character, should be denied. The case of *Corbett v. De Comeau* (54 How. 506), holds that the order should be granted, and the court should pass upon the question of the witness' privilege when he raised it, but this case rested upon the view that the examination of a party before trial was a matter of right and not of discretion. This construction is no longer held by any court in the department, and the case cannot, therefore, be deemed authority. The papers are insufficient in many other respects, and the order must be dismissed, with costs.

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If these were the facts by means of which the defendant obtained possession of the goods, then he was guilty of procuring them by false pretenses, for which he was liable to be indicted, convicted and punished. And that liability still exists, for the sale was made on or about the 28th of April, 1881.

The entire object of the examination, as it has been made to appear, is to show by Brown and by his books and papers, which are expected to be produced, that he procured this property from the plaintiff by means of false and fraudulent representations concerning his circumstances ; and it therefore becomes important to determine, whether he can be subjected to an examination as a witness to prove these facts. It has been provided, that the examination of a party under an order is subject to the same rules as if he was examined upon the trial (*Code of Civ. Pro.* § 880) ; and, if he should be examined upon the trial, he could not be required to give an answer which would tend to accuse himself of a crime or misdemeanor, or to expose him to a penalty or forfeiture (*Id.* 837).

This was also the rule as it existed before the adoption of the Code. For a witness was not required to give any answer which would have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, or when, by answering, a link may be added to a chain of testimony tending to such result (*Henry v. Bank of Selina*, 1 *Com.* 83, 86 and 89).

This subject was considered in *Phoenix v. Dupuy* (2 *Abb. N. C.* 146, 158-159), and it was there held, that the examination of a party could not be taken under these provisions of the Code when it would tend to establish the fact that he had been guilty of a crime or misdemeanor. And the same conclusion is adopted in *Burbank v. Reed* by the general term of the second department (11 *Weekly Digest*, 576).

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Under these provisions of the Code, sustained and applied as they have been by the courts, the order which was made in this case for the examination of the defendant, was unauthorized.

It must, therefore, be reversed, and an order entered vacating the order requiring the defendant to appear and be examined, with \$10 costs, besides disbursements, to the appellant of this appeal.

BRADY, J., concurred.

**BERDELL, APPELLANT, v. BERDELL ET AL.,
RESPONDENTS.**

**SUPREME COURT, FIRST DEPARTMENT ; GENERAL TERM,
MARCH, 1882.**

§§ 881, 882.

Examination of party before trial.—When party examining adverse party may have a further examination at the trial.—When further examination cannot be had at the trial.—When examination not used, it seems that the witness may be called for a general examination at the trial.

The Code does not, by any of its provisions, preclude a party who has examined his adversary as a party before trial from calling the person so examined as a witness at the trial, when the object of the second examination is declared to be that of proving additional facts in regard to which the witness has not already been examined, or to ask questions inadvertently omitted on the first examination.*

* See note on examination before trial, 1 *Civ. Pro. R.* 94, 95, 96.

The case of *Dambmann v. Butterfield* (15 *Hun*, 495), bears somewhat upon the point here decided; it was there held, that when a party has once been examined before trial at the instance of the adverse party, he cannot be again so examined without special grounds shown. But when it is made to appear that new facts have been developed requiring a further examination, "either because of material omissions in the former exam-

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But where the first examination has been read upon the trial by the party in whose favor it was taken, the court may properly exclude that party from a further examination of the witness upon the subjects embraced in the deposition.

It seems, that where an examination of a party before trial is not used or sought to be used by the party at whose instance it was taken, such party is not precluded by the Code from calling the witness on the trial for a general examination.

(Decided April 10, 1882.)

Appeal by plaintiff from a judgment of the special term, dismissing the complaint.

This was an action brought by a judgment creditor to set aside certain conveyances of real property, alleged to have been made without consideration, and for the purpose of defeating the satisfaction of the plaintiff's execution.

One of the defendants, Julia C. Berdell, was, at the instance of the plaintiff, examined as a party before trial, under the provisions of section 871 *et seq.* of the Code, such examination being held, by consent, at the office of the defendant's counsel. The other facts necessary to an understanding of the question involved are stated in the opinion.

Alfred Taylor (*Taylor & Parker*, attorneys), for appellant:

Although an examination be had before the trial, there is no provision of the Code precluding an examination at the trial also. Section 881 provides that the deposition *may* be read in evidence. The disjunctive

ination or his examination had become important upon new questions," a second such examination could be had.

Where the examination of the plaintiff has been taken before trial, at the instance of the defendant, and read at the trial without objection, the further examination of the plaintiff, orally, at the trial, in his own behalf, and in reply to the defendant's evidence, is not error, and is in the discretion of the court. *Misland v. Boynton*, 14 *Hun*, 625; affirmed, 79 *N. Y.* 680.

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phraseology of section 391 of the old Code has been omitted from the new revision.

Where there is a reason for a further examination at the trial, such as an omission, by inadvertence, to ask some question or prove some fact, it should be allowed (*Wilmot v. Meserole*, 40 *N. Y. Super.* 321).

Alex. Thain (Niles & Bagley, attorneys), for respondents:

It is the uniform practice at *nisi prius* not to permit a second examination of a party where he has been examined by his adversary before the trial. If the examination be had before the trial, it must be *instead* of an examination at the trial ; and the first examination being optional, the party resorting to it is bound by his election, and he cannot have it both before and at the trial (*Wilmot v. Meserole*, 40 *N. Y. Super.* 321).

Even if a second examination were allowable, to permit it would be discretionary with the court.

Per Curiam.—Our examination of this case upon the merits leads to the impression, that the complaint was properly dismissed. But we are not disposed to pass upon that question distinctly, because we think a new trial must be granted upon exceptions taken to the rulings of the court.

The plaintiff had examined the defendant Julia C. Berdell, under the provision of the Code. He subpoenaed Mrs. Berdell, and brought her into court as a witness at the trial, and asked that she be sworn. The counsel for the defendant objected to her being sworn, on the ground that she had been examined before trial at the instance of the adverse party. The court thereupon ruled, that, having been examined before trial at the instance of the adverse party, she could not be

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called as a witness at the trial by the adverse party. To this ruling the plaintiff duly excepted.

The following further proceedings were then had, as appears in the case :

Plaintiff's counsel. — I propose to call Julia C. Berdell to prove additional facts, about which she was not examined before the trial.

Objected to.

The Court.—You cannot call her as a witness, having examined her before the trial.

To which ruling the plaintiff duly excepted.

Plaintiff's counsel. — This examination was taken at the office of the defendant's counsel, and no judge was present, and I desire to ask her some questions inadvertently omitted to be asked on the examination.

The court refused to permit her to be called as a witness, to which ruling counsel for plaintiff duly excepted.

Plaintiff's counsel. — I desire to prove by her some facts not included in this examination, and on which she was not examined.

The court refused to permit her to be called as a witness, to which ruling of the court plaintiff duly excepted. Under this ruling of the court, plaintiff's counsel read the examination of Julia C. Berdell, taken before trial.

We are of the opinion, that the rulings of the court, in disposing of the several offers of the counsel, and in refusing to permit Mrs. Berdell to be sworn as a witness, were erroneous. The Code does not, by any of its provisions, preclude a party who has examined his adversary in an action, out of the court, from calling him at the trial as a witness, especially when the object of so calling him is declared to be to prove additional facts, about which he was not examined, and to ask questions inadvertently omitted to be asked on the exam-

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ination. Where an examination taken out of court has been read upon the trial by the party in whose favor it was taken, the court may properly preclude that party from further examination upon the subject embraced in the deposition. But even in such case, it was said in *Wilmot v. Meserole* (40 *Superior Court Rep.* 321), that the party would be at liberty to examine as to new matter, or as to matters which by inadvertence had been omitted.

But where an examination taken out of court is not used or sought to be used by the adverse party, we do not think the Code precludes the calling of the witness by such party on the trial in court, for a general examination. But if this be not so, that is certainly no ground for holding that an examination cannot be had as to new matter or as to subjects inadvertently omitted.

For these reasons we think the judgment must be reversed and a new trial granted, with costs to abide the event.

DAVIS, P. J., BRADY and INGALLS, JJ., sitting.

Gates v. Canfield.

GATES v. CANFIELD.

SUPREME COURT, FOURTH DEPARTMENT; STEUBEN
COUNTY SPECIAL TERM, JANUARY, 1882.

§§ 2951, 3235.

*What is determined by a nonsuit.—What is a final judgment.—Answer of title in action for trespass *quare clausum fregit* brought in justices' courts.—What is not necessary to constitute a trial of an issue of fact.—When a nonsuit is such a trial under § 3235.—How plaintiff may be deprived of the means to avoid the question of title, when action renewed in higher court.—In whose favor costs taxed, when title does not come into question in higher court.*

A nonsuit determines simply that upon the facts presented the plaintiff cannot recover; it decides the particular action, but does not decide the rights of the parties, except as to the precise facts presented by them at the time it is ordered. And a final judgment in an action is one which finally disposes of the particular action so that it is ended; it need not settle all the rights of the parties, but only finally determine the particular action. Accordingly, where an action of trespass *quare clausum fregit*, originally brought in a justice's court, was, on the defendant's answer of title, renewed in the supreme court, and on the trial, after the plaintiff had given evidence and rested, the question of title to real property not having arisen, he was nonsuited on motion of the defendant,—*Held*, that the judgment entered upon such nonsuit was a final judgment in the action.

To constitute a trial of an issue of fact, it is not necessary that the issue should reach the jury; if witnesses are examined, the trial does not cease to be the trial of such an issue because one party fails in his proof, and the judge draws a conclusion from the testimony instead of sending it to the jury to draw the conclusion under his direction. Accordingly, under the facts as above stated,—*Held*, that the trial was of an issue of fact within the meaning of section 3235 of the Code, and the judgment entered upon the nonsuit being a final judgment, and the title of real property not having come into question on the trial, costs were properly taxed in favor of the plaintiff under section 3235.

An action of trespass *quare clausum fregit* brought in a justice's court,

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when only the fact of possession or unlawful entry is involved, can properly be tried before the justice; and if the defendant has not committed the trespass, he should try that fact before the justice. But if he has gone upon the land, and desires to try the question of title, and the right is involved, and for his own safety he has put in an answer of title, and would place it beyond the means of the plaintiff to avoid the question of title on the trial in the higher court, he should admit the trespass and justify under his title, in which case, the plaintiff's cause of action being admitted, there could be no nonsuit unless the plaintiff voluntarily submitted thereto, which would be a mere default—a refusal by him to further proceed in the action—and vastly different in substance from an adjudication of nonsuit by the court on facts presented at the trial.

Motion by defendant to set aside a taxation of costs made under section 3235 of the Code in favor of the plaintiff, and that the costs be taxed in defendant's favor, and inserted in the judgment of nonsuit recovered by him against the plaintiff.

The opinion states the facts.

H. Bemis, for motion.

J. H. Stevens, opposed.

RUMSEY, J.—The action was trespass upon lands of the plaintiff, and was originally brought in a justice's court; but, upon plea of title, was removed to this court.

At the trial, at the September circuit, 1881, the plaintiff gave evidence and rested, and thereupon, on motion of defendant, the plaintiff was nonsuited.

The title of real estate did not come in question on the trial.

Thereafter each party presented to the clerk of Steuben county his bill of costs, and each requested the clerk to tax the bill presented by him. The clerk refused to tax costs for the defendant, and taxed costs for the plaintiff. The defendant now moves to set aside that taxation, and that his costs be taxed and inserted in the judgment.

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The right to costs in this class of cases is controlled by section 3235 of the Code of Civil Procedure. The portion of that section which is important here, reads thus: * * * "where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified, that the title to real property came in question on the trial."

The defendant insists that a judgment rendered upon a nonsuit is not a final judgment in the action, within the meaning of this section. A nonsuit determines simply that, upon the facts presented, the plaintiff cannot recover. It decides the particular action, and a judgment entered upon it may be appealed from to the court of appeals. But it does not decide the right of the parties except as to the precise facts presented by them at the time it is ordered. If a judgment is not final within this section, unless all the rights of the parties in the controversy are determined, a judgment rendered on a nonsuit is not a final judgment. But I think that a final judgment in an action, is the judgment which finally disposes of the particular action, so that that action is at an end. The Code defines a final judgment as the final determination of the right of the parties in the action (*Code Civ. Pro.* § 1200). An appeal to the court of appeals lies only from a final judgment (*Code Civ. Pro.* § 190, *subd.* 1), but no one ever doubted that an appeal lay from a judgment rendered on a nonsuit. A final judgment is defined by Blackstone, as one which concludes the action (3 *Black. Com.* 398); by Kent, as one which determines that particular cause (1 *Kent Com.* 316). The decisions of the courts also hold that a judgment to be final need not settle all the right of the parties, but need only finally determine the particular action (Western *v.* City Council, 2 *Pet.* 449; Corning Tunnell Co. *v.* Pell, 4 *Col.*

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184; Cambridge Valley Nat. Bank *v.* Lynch, 76 N. Y. 514, 516). The judgment entered on this nonsuit is a final judgment.

Was it entered upon the trial of an issue of fact? That the proceeding which resulted in this nonsuit was a trial, was not denied. It has been so held (*Allaire v. Lee*, 1 Abb. Pr. 125; *Van Doren v. Horton*, 19 Hun, 7). It was clearly not the trial of an issue of law, for an issue of law arises only on a demurrer (*Code Civ. Pro.* § 964). The issue joined here was an issue of fact. It is true, that issue never reached the jury, but it was not because the trial was not of an issue of fact, but because the facts instead of being presented to a jury for decision were left undisputed by the parties, and the effect of them was for the court. When the answer has been served containing a general denial, the issue of fact is joined. When the trial is moved, the trial of an issue of fact is begun; and, if witnesses are examined, the trial does not cease to be the trial of an issue of fact, because one party or the other fails in his proof, and the judge draws a conclusion from the facts presented instead of sending it to the jury to draw the conclusion from them under his direction. The Code says an issue of fact must be tried, unless it is disposed of in the way provided for by chapter 6 (§ 965). The way provided for by chapter 6 is a motion for defect of form. Unless that course is taken, there must be a trial; and, an answer being served containing a defense, the trial is of an issue of fact.

I think, therefore, that this trial was of an issue of fact within the section under examination.

But the defendant says, that such a holding puts him entirely in the power of the plaintiff, who can always fail in his proof or submit to a nonsuit at the trial, and thus charge the defendant with a bill of costs, although he has put the title in question in good faith. But if

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the defendant has not committed the trespass, he should try the fact in the justice's court. If he has gone upon the land and wants to try the question of title, he might and should admit the trespass, and justify under his title. In that case, the plaintiff's cause of action being admitted, there could be no nonsuit, unless the plaintiff submitted voluntarily to a nonsuit. But that is a mere default—a refusal by plaintiff to proceed further with the suit—and vastly different in substance from an adjudication by the court on the facts presented to it.

There is another consideration to be noticed. The action for a trespass *quare clausum fregit*, when it involves only the fact of possession or of an unlawful entry, can be cheaply and summarily tried in a justice's court. If the right is involved, the defendant, for his own safety, may bring it into this court. But if he undertakes to do that, he should see to it, that the exigencies of his case require it, and that it will so appear.

The fact of possession and entry can be tried in the forum chosen by the plaintiff. If the defendant seeks another court, he must, at his peril, cause the facts to appear which justify him in it. The nonsuit might have been had before the justice. As the defendant did not choose to ask for it there, he must take the consequences of asking for it at the circuit.

The motion must be denied, with \$10 costs to plaintiff.

Tompkins v. Smith.

TOMPKINS, APPELLANT, *v.* SMITH ET AL.
RESPONDENTS.

N. Y. SUPERIOR COURT, GENERAL TERM; JANUARY,
1882.

§§ 548, 549.

Action to recover money lost at play.—Rights of loser, by what conferred.—How the gambling act should be construed.—In action to recover money lost at play, order of arrest cannot be granted.—Where order of arrest vacated as a matter of strict right, defendant cannot be compelled to stipulate not to sue for false imprisonment.

No right of action existed at common law to recover money lost at play, and without the aid of the statute (1 R. S. 661, §§ 8-21), the loser would have no remedy.[1] [1] Whatever rights the loser has are conferred by the statute, the construction of which should not be forced or extended beyond its natural effect; and more especially is this the case, when to so extend it would be wholly in conflict with the tendency to strictly construe laws which imperil or in any way interfere with the liberty of the citizen.[1]

An action to recover money lost at play is not one in which an order of arrest can be granted under subdivision 2 of section 549 of the Code—"to recover damages for * * * an injury to property, including the wrongful taking, detention, or conversion of personal property."

Section 548 of the Code expressly declares that, "a person shall not be arrested in a civil action or special proceeding, except as prescribed by statute." [1] There is no express provision of statute authorizing an order of arrest in such an action; and regarding the right to maintain the action as simply statutory, then, as the remedial statute does not give the right to arrest, it would be a forced and improper construction of section 549 to hold that the winning of money at play came within its provisions.[1] [1]

The nature of an action to recover money lost at play, discussed. Where an order of arrest is vacated, not as a matter of favor to the defendant, but of strict right under the law, the court has no power to impose as a condition, that the defendant shall stipulate not to bring an action for false imprisonment.[1]

Affirming 1 Civ. Pro. R. 398.

(Decided February 6, 1882.)

Tompkins *v.* Smith.

Appeal by plaintiff from an order of the special term vacating an order of arrest, and denying a motion that the defendants be required to stipulate not to sue for false imprisonment.

The facts are stated (*1 Civ. Pro. R.* 399, 400).

L. E. Chittenden (*Chittenden, Townsend & Chittenden*, attorneys), for appellant:

In addition to the points below, urged that the action sounded in tort and not in contract, *Moak's Underhill on Torts* 18; *Betts v. Hillman*, 15 Abb. 184; *Moses v. Macferlan*, 2 *Burr*, 1005; *McCoun v. N. Y. C. and H. R. R. R. Co.*, 50 *N. Y.* 176; *Bevins v. Reed*, 2 *Sands*. 436; *Smith v. Bromley*, 2 *Doug.* 696; *Lewis v. Miner*, 3 *Denio*, 103: that 1 *R. L.* (of 1813), 153, giving an action of debt for money had and received was inapplicable, as the *R. S.* had omitted such provision, *Moran v. Morrissey*, 18 Abb. 131: and that *Collins v. Ragrew* (15 *Johns.* 5), was, therefore, no longer authority. That where the right to arrest was inherent in the action, a plain case must be made to justify the court in interfering with the order, *Field v. Bland*, 9 *Rep.* 484; and *Northern R. R. Co. v. Carpenter* (4 Abb. 47), and *Salhinger v. Adler* (2 *Rob.* 704), were cited as additional authorities to sustain the position, that the court had the power to require the stipulation not to sue for false imprisonment, as a condition to vacating the order of arrest.

Douglas Campbell, for respondents:

At common law gaming was not illegal *Bunn v. Riker*, 4 *Johns.* 438, 439; *Cockford v. Lord Maidstone*, reported in *Oliphant on Horses, Racing, Wagers and Gaming*, 42 *Law Library* [N. S.], 221*; *Morgan v. Groff*, 4 *Barb.* 524; 2 *Pars. on Contracts*, 626; 4 *Cooley's Black. Com.* 172*, note; and it is made illegal solely by statute.

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The first English statute is 9 Anne Ch. 14, by which the loser of £10 or more could sue the winner "and recover it back by action of debt at law," 4 *Cooley's Black. Com.* 172 *. The form of action to recover money paid on a wager has always been that of an implied contract, *Bland v. Collett*, 4 *Camp.* 157; *Blandon v. Hibbert*, *Id.* 37; *Turner v. Warren*, 2 *Strange*, 1079; *Ruckman v. Pitcher*, 1 *N. Y.* 392. The action was debt, and trover could not be maintained, *Morgan v. Groff*, 4 *Barb.* 524; *Like v. Thompson*, 9 *Barb.* 315. The action is not one for "the wrongful taking of personal property." The plaintiff voluntarily paid his money to the defendants, having lost it in a game of chance, the defendants did not "take" it in the sense in which that word is used in subdivision 2 of section 549, they merely received it under an illegal contract. The plaintiff has a right under the statute to disaffirm this contract and recover the money as having been paid without consideration, but the action must be one purely on contract, upon the implied promise to pay the money over to its rightful owner, *Cassidiere v. Beers*, 2 *Keyes*, 198.

The condition that the defendant should not sue for damages was, even under the old Code, imposed only when the order of arrest was vacated as a matter of favor, resting in the discretion of the court, and not where the order was vacated as a matter of strict right, 1 *Wait's Pr.* 703, and cases cited; *Decker v. Judson*, 16 *N. Y.* 439; *Merchants' Bank of N. H. v. Dwight*, 13 *How.* 366; *Northern R. R. Co. v. Carpentier* (4 *Abb.* 47), and *Salhinger v. Adler* (2 *Rob.* 704), properly considered, are not in conflict with this principle; and it is only in cases resting in discretion that the question of the absence of malice or probable cause in obtaining the order is to be considered in favor of the plaintiff. Whatever doubt may have existed under section 182 of the old Code, section 559 of the Code of Civil Procedure

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has removed. The undertaking to be given on obtaining an order of arrest must be to the effect that, "if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay," etc., which recognizes the right of the defendant to maintain an action against the plaintiff where the order has, at any time, been vacated; and when the order is vacated as illegal, to require such a stipulation would, in effect, nullify the provisions of the Code.

By the Court.—RUSSELL, J.—The order of arrest was vacated on the theory that the law does not authorize an arrest in such a case as this.

It was claimed on the argument, by the appellant, that the order of arrest ought to have been maintained, because the retention by the defendants of the moneys sued for brought the case within the second subdivision of section 549 of the Code of Civil Procedure, which gives to a plaintiff a right to arrest a defendant where the action is for "an injury to property, including the wrongful taking, detention, or conversion of personal property." The appellant's contention was, that the action sounded in tort; the respondents contended, that it sounded only in contract, raised or implied by [1] the statute, which gives the right of action. There can be no doubt, that no right of action existed at common law to recover back moneys lost in gaming. The extent to which the courts went was to hold that the law would not enforce such contracts. The action is solely a creature of statute.

Our first statute on this subject was the act of 1801 (1 R. L. [of 1813], 152, Chap. 46), which, following the statute of Anne, gave an action of debt as "for so much money had and received" to recover back moneys lost at play. This was followed by the provisions of the Revised Statutes (section 14 of article 3 of title 8 of

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chapter 20 of part 1), which is, "every person who shall, by playing at any game, or by betting on the sides or hands of such as do play, lose at any time or sitting, the sum or value of twenty-five dollars or upwards, and shall pay or deliver the same or any part thereof, may, within three calendar months after such payment or delivery, sue for and recover the money or value of the things so lost and paid or delivered, from the winner thereof."

Were the act of 1801 still in force, it would be quite clear that the appellant's contention could not be sustained, because that act distinctly says the action should be "of debt as for money had and received." But the appellant claims that inasmuch as the Revised Statutes have omitted the words "an action for debt, etc.," that the nature of the action has been changed by statute, or may be changed at the option of the plaintiff; and that while he may still sue as for money had and received, he may also sue in tort, and insists that his action should be regarded as for the tortious detention of personal property.

It is of some significance against this contention, that it is novel, and that the form of the actions reported in the books since the Revised Statutes were adopted, has remained the same as it was before, at any rate, until the adoption of the Code of Procedure, since which time it has become customary to state the cause of action according to the fact rather than according to the old forms of pleadings.

An examination of all the authorities cited on the argument, and a somewhat extended research on our own part, have not enabled us to find a single case in which a plaintiff claimed the right of arrest, and none before the Code of Procedure was adopted, in which the form of the action was other than that of debt for money had and received. From this it would seem to have been the theory of the counsel who drew the plead-

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ings in all these cases, that while the words "action of debt, etc., " had been omitted from the Revised Statutes, they had been so omitted, rather because they were no longer regarded as necessary, than because there was a design, on the part of the legislature, to alter the form of the action or the rights and remedies of the parties under it.

All these cases, on the part of both counsel and court, seem to have proceeded upon the theory, that the law created an implied contract on the part of the person receiving money lost at gaming to return the money to the person who had lost it; or that, as the money was received without consideration, the statute had removed the bar to the loser's recovery, theretofore existing, because the loser was *in pari delicto* (*Meech v. Stoner*, 19 N. Y. 26; *Caussidiere v. Beers*, 2 *Keyes*, 198; *Morgan v. Groff*, 4 *Barb.* 524; *Like v. Thompson*, 9 *Barb.* 315; *Fowler v. Van Surdam*, 1 *Denio*, 557; *Stannard v. Eytinge*, 5 *Rob.* 90; *Betts v. Hillman*, 15 *Abb.* 184; *Moran v. Morrissey*, 18 *Abb.* 131; *Betts v. Bache*, 23 *How.* 197; *Collins v. Ragrew*, 15 *Johns.* 5).

[²] Without the statute the loser would have no remedy whatever, and as the statute gives him whatever rights he has, its construction ought not to be forced or extended beyond its natural effect. More especially is this the case, when to so extend it would be in conflict with the whole tendency of our decisions, which insist upon strict construction of laws which imperil or in any way interfere with the liberty of the citizen.

[³] Courts ought not to feel at liberty to legislate into statutory actions, rights and remedies, not clearly contemplated by the statute itself. Indeed, the Code expressly says (sec. 548): "A person shall not be arrested in a civil action or special proceeding, except as prescribed by statute."

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If we should consider this question so far as it is influenced by analogy to other actions given by statute, we think a most careful examination will fail to find any case where a statute gives a right of action, not otherwise existing, in which the extraordinary remedy of arrest is permitted, unless it is given by clear enactment. Wherever it is the intention of the legislature to give a right to an extraordinary remedy, that intention is either clearly expressed in the statute itself, or in the Code of Civil Procedure. For instance, in all those cases where a statute imposes a penalty to be sued for in a civil action, it is expressly provided in the Code (sec. 549, subd. 1), that an order of arrest may issue.

[¶] That there is nowhere any express provision of the statute authorizing an order of arrest in an action to recover moneys lost at play, is, we think, almost conclusive of this controversy. That the forms of pleading have been altered by the Code does not affect the question. The weight of authority is in favor of regarding the action as one of contract rather than of tort.

[¶] But if we regard it, as we may, as sounding neither in contract nor in tort, but simply statutory, then, as the statute does not expressly give the right to arrest to enforce it, we think it would be a forced and improper construction of the section of the Code of Civil Procedure above quoted, to hold that this case comes within its provisions.

[¶] We agree with the learned judge at special term that, inasmuch as it was not a matter of favor to the defendant, but of strict right under the law, that the order of arrest should be vacated, the court had not the power to impose as a condition that the defendant should stipulate not to bring an action for false imprisonment.

The order should be affirmed, with costs.

FREEDMAN and ARNOUX, JJ., concurred.

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BISHOP, APPELLANT, v. VAN VECHTEN,
RESPONDENT.

COUNTY COURT OF ONEIDA COUNTY, DECEMBER, 1881.

§§ 2886, 2890, 3046,* 3068.

Attorneys at law in justices' courts, to be recognized in appeal proceedings.—Notice of appeal from justices' courts.—By whom notice may be signed.—Cannot be signed by attorney in fact or agent, as such.

Although attorneys at law are not recognized as such in justices' courts, yet in all proceedings on appeal from such a court, they should be recognized, and a notice of appeal may properly be signed by an attorney at law as such.^[1] ^[2]

From the judgment of a justice's court, "an appeal is taken by serving * * * a written notice of appeal;" and in respect to the notice of appeal, the former distinction in practice between an appeal from a court of record and an appeal from a justice's court, has been abolished by section 3046 of the Code of Civil Procedure.^[3]

A notice of appeal from a justice's court to the county court is a mandate of the county court, is properly entitled therein, and is governed by the same general principles as other proceedings in a court of record. The notice may be signed by a party as attorney in person, adding his office address, place of business, residence or other place where papers may be served upon him, as required by Rule 3 of the General Rules of Practice; or it may be signed by an *attorney at law*; but it cannot be signed by an *attorney in fact* or agent, as such.^[4]

Andrews v. Long †(19 Hun, 303); Hall v. Sawyer (47 Barb. 116), and Burrows v. Norton (3 Hun, 550), distinguished as having been decided under the Code of Procedure.^[5]

* By chapter 399 of the Laws of 1882, section 3046 was amended by adding at the end thereof, the clause, "*subscribed either by the appellant or by his attorney in the appellate court.*"

† Andrews v. Long (19 Hun, 303), decided in 1879, before the passage of the last nine chapters of the Code, was reversed in 79 N. Y. 573 (first reported 9 W. Dig. 513), decided in January, 1880, on the ground, that by section 1842 the appellate jurisdiction of the supreme court to review an order made by a county court, was confined to such as originated in an action brought in the county court, and did not extend to an order of the

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Motion to dismiss an appeal for a new trial, from the judgment of a justice's court.

The justice's return contained no proof of the attorney's authority, and the cause was not tried by him before the justice, and his first appearance in the action was on the service of the notice of appeal. The other facts are sufficiently stated in the opinion.

Pomeroy, Townsend & Quinn, for respondent and motion.

C. E. Howe, for appellant and opposed.

SUTTON, J.—This is a motion to dismiss an appeal to this court for a new trial upon the ground, that the notice of appeal is not properly signed.

The notice of appeal is dated June, 17, 1881, is signed "C. E. Howe, appellant's attorney," and was served with an undertaking in due form to stay execution, signed and acknowledged by the appellant in person.

The argument in favor of the motion is, that in justices' courts attorneys at law are not recognized as such, and an appearance before the justice must be by the party in person, or by an agent, or attorney in fact duly authorized, and whose authority must be proven. That the notice of appeal is the process of, and an appearance in, the justice's court. Consequently a

county court made on appeal from the judgment of a justice's court. This ruling was followed in *York v. Penny*, 21 Hun, 104; *Payne v. Terry*, *Id.* 281; *Roberts v. Marson*, *Id.* 363; *Perry v. Round Lake, etc., Association*, 22 *Id.* 293; *Cook v. Darrow*, *Id.* 306; and substantially the same ruling was laid down in *Fish v. Thrasher*, 21 Hun, 15.

Section 1342 was amended by chapter 185 of the Laws of 1881, by inserting the words, "or taken by appeal to," before the concluding clause—"a court specified in the last section but one." The foregoing cases are, therefore, so far as they deny the right of appeal under the circumstances of *Andrew v. Long*, overridden by the amendment. See *Kincaid v. Richardson*, 25 Hun, 287, 288.

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notice of appeal signed as this, "C. E. Howe, appellant's attorney," in the absence of proof in the return of his authority so to sign, is a nullity. If the premises are sound the conclusion is correct.

[¹] The provisions of the Revised Statutes regulating appearances in justices' courts are embodied in sections 2886 and 2890 of the Code of Civil Procedure, and the construction of these sections claimed by respondent is fully established by the commission of appeals, Sperry v. Reynolds, 65 N. Y. 179.

There are good reasons of public policy why this construction should be strictly adhered to. Parties in person, or by agents or attorneys in fact, not regular practitioners, frequently conduct proceedings in justices' courts, and are authorized by law to do so.

Such agents or attorneys are not officers of those courts; are not under their control, save in their presence.

The justice's court cannot summarily punish them as for contempt for proceedings taken by them without authority of their principals. It cannot grant new trials to correct errors, vacate its own judgments, or in any other manner *after judgment* grant relief to a party injured by its proceedings.

But is the notice of appeal the process of, or an appearance in, the justice's court.

The true theory of an appeal in general is, that the appellate court, upon the application of a party feeling aggrieved, issues its process commanding the court below to send up the record of the case that its judgment or decision may be reviewed.

Why should the court below issue such a process? It decided the case according to its conception of law and justice. It in effect says to the applicant for relief from its judgment or decision, you have suffered no injury. The application is made to the appellate tribu-

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nal—its answer in a proper case is, we will examine into the matter. Thereupon it issues its mandate to the court below to send up the case for review.

All this under the present practice is done by serving a notice of appeal. This notice is the application to, and the mandate of, the appellate court combined, *Witley v. Leeds*, 27 *How.* 378; 2 *Wait's Law and Pr.* 772.

All proceedings for the review of a judgment or decision of a court of record subsequent to the notice of appeal, are properly entitled in the appellate court. Why not so entitle the notice of appeal? There is nothing in the Code of Civil Procedure which makes any distinction in this regard, between appeals from judgments of justices' courts and appeals from judgments of courts of record. Section 3046 provides, * * * "An appeal is taken by serving * * * a written notice of appeal."

There is no declaration that it is an appearance in, or the process of, the justice's court. No requirement that it be signed by the appellant personally or by his [?] agent or attorney in fact. No intimation that attorneys at law are not recognized as such in all proceedings on appeal, and there is no reason of public policy why they should not be; but, on the contrary, there are the same reasons why they should be so recognized that are deemed all sufficient in other courts.

[?] There is a marked difference between the phraseology of section 3046, Code of Civil Procedure, and section 353, Code of Procedure. The latter section reads: "The appellant shall, within twenty days after judgment, serve a notice of appeal," etc. The former: "An appeal is taken by serving," etc. This change of language is ample ground upon which to base an opinion, that the legislature intended thereby to abolish the distinction between the practice on appeals from

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justices' courts and courts of record, and make the entire system more uniform and harmonious.

There are many reason why the notice of appeal should be regarded as the process of the county court and from which it may be argued that the legislature so intended.

A justice of the peace has no power or jurisdiction over a case tried by him after judgment, except to make a return, give a transcript and issue an execution.

If the notice of appeal is the process of the justice's court, why has he not the power to control, amend, dismiss, or disobey it?

If it is not the process of the county court—why has the county court power to enforce from the justice a return in obedience to the notice?

If the notice of appeal is the process of the justice's court, appellant's signature or that of his agent or attorney in fact, need not be accompanied by any designation of residence, office address, or place where papers may be served, and endless confusion and inconvenience may result.

To hold the notice of appeal the process of the county court, makes the practice simple, harmonious, uniform. To hold it the process of the justice's court, creates a legal monstrosity, and fills the practice with complications, technicalities and difficulties.

[4] We conclude that the notice of appeal is a mandate of the county court, is properly entitled therein, and governed by the same general principles as other proceedings in a court of record. A party may sign it as attorney in person, adding office address or place of business, residence or other place where papers may be served upon him, as required by Rule 2, General Rules of Practice, or by an *attorney at law*, and can not be signed by an *attorney in fact* or an agent, as such.

[5] These views somewhat conflict with Andrews v.

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Long, 19 *Hun*, 303; Hall *v.* Sawyer, 47 *Barb.* 116; Burrows *v.* Norton, 2 *Hun*, 550. These cases, however, were decided under the Code of Procedure.

The motion is denied.

RYAN, ADMINISTRATOR, &c., *v.* POTTER.

N. Y. SUPERIOR COURT, SPECIAL TERM, JUNE, 1882.

§§ 3268, 3271.

Security for costs.—When right to require absolute.—When discretionary.—Mere indigency of estate is not sufficient reason for requiring administrator to give.

In a case within section 3268 of the Code, the defendant has an absolute right to require the plaintiff to give security for costs, unless such right has been lost by the laches of the defendant. But in a case within section 3271, to require such security is discretionary with the court.

In an action brought and prosecuted in good faith by an administrator, the court should not require him to give security for costs, simply because he is the administrator of an estate which has no funds except the claim in litigation.

Motion to require the plaintiff to give security for costs.

The action was brought by the plaintiff, as the administrator of one Ryan, to recover the sum of \$5,000 damages for the death of the said Ryan, alleged to have been caused by the negligence of the defendant in the construction, management and care of a certain building in the city of New York, which was destroyed by fire on January 31, 1882, when the plaintiff's intestate, who was on the premises, lost her life.

The moving affidavit set forth that the plaintiff had admitted to the defendant, that the decedent left no property, real or personal, and that there was no prop-

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erty or fund belonging to the estate wherewith to pay the costs of the action should the plaintiff be defeated ; and that the plaintiff personally possessed no property whatsoever ; but there was no charge that the action was being prosecuted in bad faith.

In opposition to the motion, it was urged that the fact of the plaintiff's personal impecuniosity could have no bearing upon the decision of the motion — his pecuniary responsibility being in question, solely in connection with his management of the estate, until he was charged with mismanagement, or bad faith in the prosecution of the action ; that the indigency of the estate of a decedent was not one of the cases in which the statute prescribed that security could be demanded as of right.

Townsend, Dyett & Einstein, for motion.

Chas A. Hess, opposed.

TRUAX, J.—In a case within section 3268 of the Code of Civil Procedure, the defendant has an absolute right to require the plaintiff to give security for costs, unless such right has been lost by the defendant's laches ; but under section 3271, the court may, in its discretion, require the plaintiff to give such security. If an action is brought and prosecuted in good faith by an administrator, the court should not require him to file security for costs, simply because he is the administrator of an estate that has no funds except the claim in litigation. (See *Healy v. Twenty-third Street R. R. Co.*, 1 N. Y. Civ. Pro. R. 15, and cases there cited). Motion denied, with \$10 costs to abide the event.

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SCHULTZ, RESPONDENT, *v.* SCHULTZ, APPELLANT.
SUPREME COURT, FIRST DEPARTMENT; GENERAL TERM,
JANUARY, 1882.

§§ 450, 549.

Action by wife against husband.—Can be maintained for assault and battery.—Order of arrest may be granted in such action.

Under section 7 of chapter 90 of the Laws of 1860, amended by chapter 172 of the Laws of 1882, a wife can maintain an action for assault and battery against her husband* ; and an order of arrest for "personal injury," may be granted under subdivision 2 of section 549 of the Code, *Freethy v. Freethy* (42 *Barb.* 641), *Longendyke v. Longendyke* (44 *Barb.* 366), and *Perkins v. Perkins* (62 *Barb.* 531), criticised.

(*DAVIS, P.-J.*, dissenting.)

(Decided April 10, 1882.)

Appeal by defendant from an order of the special term, denying a motion to vacate an order of arrest.

The action was brought by Theresa Schultz, the wife of Theodore Schultz, against the said Theodore Schultz, to recover the sum of \$10,000 damages for an assault and battery alleged to have been committed by him upon the person of the plaintiff.

An order of arrest was granted by a judge of the court, under subdivision 2 of section 549, and accompanied the summons. From the affidavits upon which the order was granted, it did not clearly appear whether the action was for a limited divorce or for damages for a personal injury ; but the cause of action set forth by the complaint, served subsequent to the defendant's motion to vacate the order, was for assault and battery, and the objection that the papers upon which the

* A husband has no right to beat his wife nor to inflict corporeal punishment upon her, *People v. Winters*, 2 *Park. Orim. R.* 10.

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order had been granted did not sufficiently disclose the nature of the cause of action, and were inconsistent with themselves, upon which theory the appeal was partly prosecuted, seems to have been disposed of in the first paragraph of the prevailing opinion.

Benno Loewy (*Jacob Abarbanell*, attorney), for appellant:

If the action be treated as one for a limited divorce, the defendant could be arrested only under subdivision 4 of section 550 of the Code, and the order of arrest should have been granted by the court (*Goldsmith v. Goldsmith*, 1 *Law B.* 75).

The case of *Jamieson v. Jamieson* (11 *Hun*, 38), does not apply under the present Code.

No action to recover damages for a personal injury can be maintained by a wife against her husband, *Longendyke v. Longendyke*, 44 *Barb.* 367; *Freethy v. Freethy*, 42 *Barb.* 643; *Perkins v. Perkins*, 62 *Barb.* 531; *Berdell v. Parkhurst*, 19 *Hun*, 538; opinion of *BARNARD*, P. J., at page 360. By section 557, it must appear "that a sufficient cause of action exists" in order to uphold the arrest; and, if this action be one to recover damages for a personal injury, it cannot be maintained by the wife, and the order appealed from should be reversed.

L. Asbacher, for respondent.

By the Court.—*BRADY*, J.—This is an action for assault and battery; the parties are husband and wife. There is no doubt that the papers presented upon the motion contain a sufficient statement of the cause of action, and the question is, therefore, whether the defendant, being the husband of the plaintiff, can be arrested and held to bail in such an action as this.

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The Code (§ 549, subd. 2), authorizes the commencement of an action to recover damages for a personal injury, and the granting of an order of arrest therein generally, containing no provision as to the suitor who asks for the remedy. It presents nothing, therefore, upon the question suggested. There is nothing, either, contained in the acts of 1848 and 1849 in relation to married women (see Laws of those years) bearing upon the subject here to be discussed.

In 1860, however, an act [Chap. 90] was passed by the legislature (see Laws of that year, p. 157), which seems to be an independent act, having no relation whatever to the acts of 1848 and 1849.

It was provided by section 7 as follows: "And any married woman may bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were *sole*." That section was amended by an act passed in 1862 (see Laws of that year, Chap. 172), but not in respect to the provision relating to her right to bring an action, as provided by the act of 1860.

These acts in express terms, therefore, conferred the right, and they were acts that treated of the property and rights of a married woman as if *feme sole*, and unmarried, to maintain an action against *any* person for any injury to her person or character. And it was declared in both acts, that the money received upon the settlement of any such action should be her sole and separate property.

There are some adjudications which are supposed to have interpreted the intention of the legislature, in regard to, and the effect of, the provision referred to in the statutes of 1860 and 1862, which are not in harmony. In the case of *Freethy v. Freethy* (reported in 42 *Barb.* 641), it was decided, that a wife could not main-

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tain an action against her husband to recover damages for slander uttered by him, and it was declared, that the legislature did not intend by the laws of 1862, to which reference has been made, to change the common law rule as to the disability of husband and wife to sue each other at law. It was admitted in that case, that the words "any person" in the acts of 1860 and 1862, were very comprehensive, and might, in a proper case, be held to include a husband, but it was said that the question was, "whether, in view of all that the act contains, and of all the surrounding circumstances, we can infer that the legislature intended that a wife might bring such an action," and, further, "if the words necessarily included the husband, we should not be at liberty to say that they were inoperative." "But," the court said, "they do not; and it is our duty to ascertain, if we can, whether the legislature *meant* to include suits against him."

This is a very well considered case, but it is supposed that devotion to the rigorous rule of the common law governing the relation of husband and wife controlled the learned justice and influenced his decision. He is not the only learned writer who has yielded to the influence of that same emotion, and thus circumscribed the objects and purport of the acts of 1848, 1849, 1860 and 1862.

In the case of *Longendyke v. Longendyke* (reported in *44 Barb.* 366), it was held, that a married woman could not sue her husband in an action for assault and battery. The learned justice delivering the opinion in that case commenced by saying, that it was conceded by counsel that by the rules of the common law, husband and wife could not sue each other in a civil action, and that the question presented was, whether that right had been conferred by the statutes of 1860 and 1862, to which reference has been made. It was said also, in that case, that the

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right to sue the husband in an action for assault and battery might, perhaps, be covered under the literal language of the section, but the learned justice said that he thought, that such was not the meaning and intention of the legislature, and should not be the construction given to the act, for certain reasons which he assigned — one of which was, that it was contrary to the policy of the law and destructive of that conjugal union and tranquillity which it has always been the object of the law to guard and protect. And he said, that the act of 1862 conferred the power to sue and be sued in somewhat broader terms than those contained in the act of 1860, but not in the manner, he thought, to lead to the implication that the husband was intended to be permitted to be sued by the wife for injuries to her person and character, as in an action for assault and battery or slander.

It is not regarded as discourteous to say, that the ill-treatment of the wife by the husband, which consists in the violence of an assault and battery, is more destructive to conjugal union and tranquillity than the declaration of a right in the wife to maintain an action against her husband for an assault and battery upon her would be. It is not at all unlikely that it would operate as a restraint upon militant husbands disposed to indulge in such evidence of conjugal union and tranquillity.

No husband, either by the laws of God or man, in any civilized community, has the right thus to abuse his wife, although it was perhaps recognized in earlier times as a principle of the Saxon law, and was as contemptible as it was barbarous. But that view no longer prevails. If the husband be disposed to indulge in violence against his wife, he should be restrained by all the rules designed to prevent brutality. This class are the only persons who would be affected by the enunciation of the right of a wife to maintain such an action. Men who have no kindred propensities would not fail to

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recognize the rule as a just one. It would be a condemnation of barbarous acts, as well as an expression of the right to indemnity for their commission.

In the case of *Perkins v. Perkins* (reported in 62 *Barb.* 531), it was declared that a husband could not maintain an action at law against his wife to recover pay for services rendered, no more than he could before the acts under consideration were passed. The learned justice who delivered the opinion in that case exhibited his devotion to the common law doctrine which prevailed in this State prior to the passage of the acts mentioned. He said that; "At common law the husband and wife, by marriage, became one person. The very being or legal existence of a woman was, by the common law, suspended during the marriage, or at least was incorporated and consolidated into that of the husband, under whose wing and protection she performs every act."

It may not be improper to say, that she could not derive any particular benefit from being under the wing and protection of a husband who commits an assault and battery upon her. It may possibly be that the husband, in performing such an act, designed to exercise in anticipation all the privileges that might be assumed by any man over a woman, and, by committing it, to anticipate as well a similar act by any other person, and from the proud consciousness of being the absolute possessor of the woman to whom he was united by the marriage tie. It may possibly be that this incorporation and consolidation spoken of is of such a character that any husband beating his wife must necessarily beat himself. This is certainly a logical result.

These statutes, it was also declared, were in derogation of the common law, and were to be construed with reference to that law as it existed when they were passed. The answer to this is, that the object of these statutes was to invade the common law, and dispel it,

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which they have successfully done. If the common law was to be preserved, then, it was not necessary to pass any statutes in reference to the subject. The statutes were presumably intended to overcome, in many respects, the disability which the common law had created, and to remove the impediments by which married women were surrounded and their rights subverted. The learned justice admitted that the statute of 1862 conferred in general terms upon a married woman the power to sue and be sued, in all matters having reference to her sole and separate property, and also to recover damages for injuries to her person, which damages, he stated, prior to the passage of the act, belonged to her husband. Then giving evidence of the influence upon his mind of the rules of the common law, to which he so frequently refers, he concluded by saying, that until the highest court of review should determine otherwise, he felt bound to hold, that the unity of person created by the marriage contract between the husband and wife had been no further severed than the statutes, in express terms, or by necessary implication, had affected that purpose.

It is respectfully insisted, that the statute of 1862 conferred in express terms the right to maintain an action against any person for a personal injury, and by implication, if implication were necessary to be invoked, against her husband, who has no more right to beat her than a stranger. The marriage tie conferred no such power, no such right, and no such privilege. It is, on the contrary, founded, or supposed to be if not in fact, upon the proposition of love and affection, which would not only repudiate, but look with abhorrence upon any such treatment.

In the case of *Berdell v. Parkhurst* (reported in 19 *Hun*, 358), however, it was held, in the second district, that a husband might maintain an action at law against

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his wife to recover property belonging to him which had been forcibly seized and carried away by her. The learned justice who delivered the opinion in that case said: "The plaintiff is entitled to own property, and so is his wife. He can bring an action for a conversion against any one who violates his right to have and possess his own property, unless his wife be a person excepted by the relation of husband and wife. She has the same right of action against all trespassers, unless her husband be the sole exception." And he further said: "It has been decided, that a wife may not sue her husband for slander, nor for assault and battery, nor for wages," referring to the cases which have been cited herein and criticised; and also the case of *Shuttleworth v. Winter* (55 N. Y., 624, 628), which has no bearing upon the subject under consideration. No reference is otherwise made to the acts of 1860 and 1862, in the opinion of the court.

In the case of *Jamieson v. Jamieson* (reported in 11 *Hun*, 38, and decided in this district and in this court), it was held that, in an action by a wife for a limited divorce on account of cruel and inhuman treatment by her husband, an order of arrest could be maintained under section 179 of the Code, and there is no substantial difference between that section and section 549 of the Code of Civil Procedure, to which reference has been made. They both provide for orders of arrest in actions for a personal injury. The learned justice who delivered the opinion in that case said, that the relief in the action must be strictly equitable, but that there was nothing inconsistent between that fact and the fact that the action was for an injury to the person. That the cause of action as alleged, and as required by the statute relating to divorces of the kind sought, sprang out of direct personal injury by the husband to his wife, which must be of such a character as to prove cruel and

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inhuman treatment, or such conduct on his part as to render it unsafe and improper for her to cohabit with him. And further, that upon the facts alleged the acts of the husband were in part criminal assaults and batteries, frequently repeated, and which inflicted serious injuries upon the person of the plaintiff, which injuries gave her the right of action for the remedy which she pursued, and that her cause of action might be properly described in the language of the Code, as one of pure injury to the person. If so, the right of arrest against the defendant was given by section 179 of the Code, on showing that the cause of action existed in the manner described.

This case therefore decides that in an action equitable in its character, resort might be had to a provision relating to actions at law for an injury to the person, to secure the application of a provisional remedy, namely, the right to arrest, and as the right to arrest is predicated in that case of the assaults and batteries committed, and which could not be resorted to except in an action relating to them, no difference in principle is discovered between that action and the present, except in the prayer for judgment.

In an action for limited divorce, the plaintiff, if successful, would obtain a decree of separation, and, also, a money judgment, directing the support and maintenance of the wife. The court would, in such a case, order the payment of a sum of money for the support and maintenance of the wife, unless there was some special circumstance in the case which would prevent such a decree. The legislature did not fail in the laws passed in 1848 and 1849 to exclude the husband from transactions with which it was deemed just or proper he should not be connected, and it was accordingly provided, that any married woman might take by gift, grant, devise or bequest from any person *other than her husband*, and

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hold to her own use, etc. If the words other than her husband had not been inserted, the act would have authorized the gift or grant from the husband directly, and this was foreseen and prevented, because it was not then so intended. In the act of 1860, *supra*, by the seventh section, the right was given to any married woman to sue and be sued on all matters having relation to her property, which might be her sole and separate property, or which might thereafter come to her by descent, devise, bequest or the gift of any person *except her husband*, in the same manner as if she were *sole*; but in the amendatory act of 1862, *supra*, the words *except her husband* were omitted, thus removing all restrictions, and giving a right unlimited. These features of legislation in the state on the subject of a married woman's disabilities arising from the strict rules of the common law, are referred to only for the purpose of showing, that when the husband was to be excepted from the provisions expressed, it was so declared. The legislature, therefore, proclaimed its own intention in its own form. Nothing of this kind was done in conferring upon a married woman the right to sue and be sued; and, if any argument is to be indulged on the question of intention, then the result is in favor of the proposition, that the husband was not to enjoy immunity from arrest in any action the wife might bring against him in which the right to arrest was allowed. But without pursuing this subject further, it is considered quite sufficient to say, that the language of the statute is, as conceded by some of the learned judges to whose opinions reference has been made, quite comprehensive enough to include the husband as one of the persons against whom the wife may bring an action for an assault and battery, and who has been relieved from liability under the language of the statute only by judicial resort to what is declared to have been the intention of the legislature on the sub-

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ject. To allow the right in an action of this character, in accordance with the language of the statute, would be to promote greater harmony by enlarging the rights of married women and increasing the obligations of husbands, by affording greater protection to the former, and by enforcing greater restraint upon the latter in the indulgence of their evil passions. The declaration of such a rule is not against the policy of the law. It is in harmony with it, and calculated to preserve peace, and, in a great measure, prevent barbarous acts, acts of cruelty regarded by mankind as inexcusable, contemptible, detestable.

It is neither too early nor too late to promulgate the doctrine, that if a husband commits an assault and battery upon his wife, he may be held responsible, civilly and criminally, for the act, which is not only committed in violation of the laws of God and man, but in direct antagonism to the contract of marriage, its obligations, duties, responsibilities and the very basis on which it rests. The rules of the common law on this subject have been dispelled, routed—and justly so—by the acts of 1860 and 1862. They are things of the past which have succumbed to more liberal and more just views, like many other doctrines of the common law which could not stand the scrutiny and analysis of modern civilization. They have gone to that bourne from which no traveler returns; where they must rest forever, undistinguished by a single tear shed over their departure.

The order appealed from should therefore be affirmed, with \$10 costs and disbursements.

DANIELS, J., concurred.

DAVIS, P. J.—(dissenting). Several authorities cited by my learned brother Brady show that it has been adjudicated by the supreme court of this State, that actions

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of assault and battery and of slander cannot be brought by a wife against her husband. Those adjudications necessarily involved the construction of the statute under which the right to bring such an action is now claimed. I think they should be accepted by us (after they have stood unreversed for so many years), until the question is otherwise decided by the court of last resort. There was nothing in conflict with those decisions in holding, as this court did, that in an equitable action for limited divorce on the ground of cruel and inhuman treatment rendering it unsafe for the wife to live with the husband, he could, on a proper case shown, be arrested and held to abide the judgment, because the nature of the action was one for injury to the person. The order of arrest in such case was in lieu of the old writ of *ne execut*, by which the court of chancery held the husband to await its judgment within the jurisdiction of the court.

I heartily concur in the unbounded detestation of wife-beaters, which my brother Brady has so forcibly expressed ; and I think the legislature might well provide a carefully prepared statute giving direct personal remedies by suit in such cases ; but the courts have decided that that has not yet been done, and the doctrine *stare decisis* requires us to leave to the court of appeals or to the legislature the gallant duty of setting the law free to redress by *civil* actions all the domestic disputes of husband and wife, whether committed by unbridled tongues or angry blows. Their rights, however, to such redress ought, I think, to be mutual; and to have due regard to the fact, that many acts, words and things that would be assaults and batteries and slanders between other persons have no such character between husbands and wives. And perhaps some provision should be made allowing reasonable opportunities for the restoration of domestic peace by amicable settlements, free

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from the liens of litigious attorneys. I must, therefore, in the present state of things, dissent from the conclusion of my brethren.

BULTMANN, LANDLORD, v. KINDELON, TENANT.

N. Y. MARINE COURT; CHAMBERS, MAY, 1882.

§ 2231.

Summary proceedings.—Do not lie to enforce forfeiture for unlawful sale of liquor by licensed innkeeper.—Proper remedy is by ejectment.—Such sale is not an illegal trade or business, within the meaning of the statute authorizing summary proceedings.

Although the sale of intoxicating liquor on Sunday by a tenant, being a licensed innkeeper, may, by force of the statutes (chaps. 540 and 616 of the Laws of 1873), work a forfeiture of all rights under his lease of the premises, advantage cannot be taken of such forfeiture by summary proceedings, because the provisions of the Code in relation to these proceedings do not, in terms, embrace such a case, and the remedy is by an ordinary common law action of ejectment.

The tenant being a licensed innkeeper, his business is legalized; and, independent of such a sale, the trade or business carried on by him is not illegal within subdivision 4 of section 2231 of the Code; and in the absence of any express statute permitting such penalty of forfeiture to be enforced by summary proceedings, that remedy cannot be invoked. *People ex rel. Jay v. Bennett* (14 Hun, 63), and *People ex rel. Shaw v. McCarty* (82 How. 152), distinguished.

Summary proceedings by landlord to recover possession of demised premises, on the ground that the tenant was using the same for an illegal trade or business.

The petition set forth, that the tenant, in violation of the statute, sold intoxicating liquors upon the premises on Sunday, and that he was, therefore, carrying on an unlawful and illegal business, which worked a forfeiture of his lease; and that by reason thereof, his term had expired, and that he held over and continued in posses-

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sion of the demised premises without permission, after the expiration of his term; and prayed for a final order awarding to the petitioner delivery of possession, as against the tenant and his under-tenant. The other facts are sufficiently stated in the opinion.

Albert Cardozo, for landlord.

John Flanagan, for tenant.

McADAM, J.—This is a proceeding instituted under section 2231 of the Code of Civil Procedure, to dispossess the tenant and under-tenants from the valuable property situate on the north-east corner of Third avenue and Thirty-fourth street, in the city of New York, because the tenant, in violation of the statute, sold liquor on Sunday, April 9, 1882. The evidence shows that the tenant had a license to sell liquor upon the premises. This license was granted by the board of excise in conformity with the laws of the State, so that independent of the single act charged, the trade or business carried on by the tenant was not illegal within the meaning of the section in question (2231, *supra*, subd. 4). The acts of 1873 (chapters 549 and 646), providing that the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee under any lease, may well be applied to the sale of liquors on the Sabbath, even by a licensed innkeeper, but such forfeiture, in the absence of an express statute permitting its enforcement by summary proceedings, must be taken advantage of by the ordinary common law action of ejectment (*Oakley v. Schoonmaker*, 15 *Wend.* 226). The cases of the People *ex rel.* Jay *v.* Bennett (14 *Hun*, 63), and People *ex rel.* Shaw *v.* McCarty (26 *How. Pr.* 152), do not apply; because, in the former case, the innkeeper had no license, and hence his trade was illegal, and in the latter case, the tenant kept a policy shop, which was

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illegal *per se*. These cases clearly came within the remedial provisions of section 2231 (*supra*) in regard to illegal trades. But in the present case, the innkeeper was properly licensed — his business was therefore legalized — and although he committed an error, which, by force of the act of 1873 (*supra*), may operate as a forfeiture of his lease, it is clear, that the penalty for such indiscretion cannot be enforced by the summary remedy now invoked, because the statute does not in terms embrace such a case (15 *Wend.* *supra*), and recourse must, in consequence, be had to one of the superior city courts by bill filed for the purpose.

Proceedings dismissed.

SHAW, LANDLORD AND APPELLANT, v. McCARTY,
TENANT AND RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM; MAY, 1882.

§§ 2231, 2260, 2261, 3191.

Summary proceedings.— Only remedy of landlord under section 1 of chapter 583 of Laws of 1878 is now ejectment.— Summary proceedings for illegal use of premises must be taken during existence of such use.—

When right to maintain ejectment does not enable landlord to take summary proceedings.— Appeal lies from general term of marine court to general term of common pleas, in summary proceedings.

The concluding portion of section 1 of chapter 583 of the Laws of 1878 — "and shall have the same remedies to recover possession thereof as are given by law in the case of a tenant holding over after the expiration of his lease" — having been expressly repealed by chapter 245 of the Laws of 1880, the only remedy which the landlord now has under said section 1 of chapter 583 to enforce his right of re-entry for the use or occupation of the premises for an illegal trade, etc., is an action of ejectment.^[4]

Summary proceedings to recover the possession of real property, in case

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of the use or occupation of the premises for an illegal trade, etc., cannot be maintained under subdivision 4 of section 2281 of the Code, if the violation of law by such use or occupation has ceased prior to the application to remove the tenant; in that event, should the lease have been voided by the act of the tenant, the landlord is remitted to his action of ejectment.^[1]

Although the right to maintain an action of ejectment for a violation of section 1 of chapter 588 of the Laws of 1873 has accrued to the landlord, such fact does not enable him to avail himself of the provisions of the Code in relation to summary proceedings for illegal use and occupation, unless he takes such proceedings while the premises are being used and occupied for the illegal business complained of.^[2]

Shaw v. McCarty (59 *How.* 487), reversed.

It was the legislative intent, as clearly indicated by section 2260 of the Code, to assimilate the practice on appeals from a final order in summary proceedings and appeals from a judgment, and to establish a uniform mode of review;^[3] [4] and, therefore, an appeal lies to the general term of the court of common pleas from a determination of the general term of the marine court, in summary proceedings to recover the possession of real property.^[5]

(Decided June 5, 1882.)

Appeal by landlord from a determination of the general term of the marine court, reversing a final order of McADAM, J., awarding delivery to the landlord in summary proceedings to recover the possession of real property. (The proceeding before McADAM, J., reported 59 *How.* 487, and the reversal thereof, by the general term of the marine court, here affirmed.)

This was a summary proceeding brought to recover the possession of the premises known as the Rapid Transit Hotel, situated in East Forty-second street, in the city of New York, on the ground that a portion of the premises were used by an under-tenant for an illegal business.

Shaw, the landlord, on July 1, 1880, purchased the premises from one Garvey, the lessor of the tenant McCarty. The tenant used and occupied the premises, with the exception of the basement which he sublet to one Lampson, for the purpose of carrying on the hotel

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business, and his lease, by its terms, would not expire until August, 1882. Shaw informed the tenant, that the sublet portion of the premises was being used as a "policy shop," and McCarty at once and on July 10, 1880, notified the under-tenant, whose occupation began in April, 1880, and whose term was from month to month, and whose rent for the month of July had been paid in advance, to vacate the premises on and after August 1, 1880, which was done at or about that date.

Thereafter, on the 17th day of September, 1880, this proceeding was begun on the allegation that the tenant, "in the month of April last, knowingly sublet a portion of said premises to one E. Darwin Lampson, for use and occupation in and for the purpose of carrying on therein the illegal trade, business, or pursuit of gambling, by means of lottery policies or lottery tickets, and that said premises have been since the — day of April, 1880, used and occupied for said illegal purpose, with the knowledge, consent and connivance of said tenant John McCarty, and have become the resort of lottery-policy gamblers, contrary to the statute in such case made and provided, without the permission of your petitioner, who, immediately upon purchasing said property and premises, notified the said tenant to suppress and discontinue said illegal trade, but he nevertheless continued the same, or the same was continued with his knowledge and permission."

The answer of the tenant denied the present use or occupation of the premises, or any part thereof, for any illegal business, and put in issue the material charges of the petition, and pleaded that the right of the landlord to recover for the alleged use of the premises for an illegal business, was *res adjudicata*. The facts out of which this plea arose, are as follows:— prior to this proceeding and in July, 1880, a like one, based upon the same charge, was instituted in the seventh district

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court before Justice LANGBEIN, who, after hearing the evidence on both sides, dismissed it, not upon the merits as he stated, but upon the ground, that it had been prematurely brought; that the rent of the under-tenant having been paid up to August first, and the tenant having given the notice to vacate, the landlord should have waited until August first, and then, if the tenant took no steps, the proceeding could properly be brought, and the dismissal was stated to be without prejudice to a new application after August first. In the course of his decision the justice remarked, that there was no doubt but that the under-tenant kept a policy shop, but that there was no proof that the tenant had knowledge of such fact. In the latter part of August, 1880, on the application of the landlord, the proceeding was removed for review, into the supreme court by *certiorari* and there argued at the May, 1881, general term, and decided October 28, 1881, the adjudication of Justice LANGBEIN being reversed. (See People *ex rel.* Shaw *v.* McCarty, 62 *How.* 152).

On the trial before the justice of the marine court, evidence was given showing the use of the sublet portion of the premises as a policy shop up to the latter part of July, 1880, and, also, evidence tending to show that the subletting had been done by the tenant with knowledge of the use to which the under-tenant intended to put his portion of the premises. Such knowledge was, however, denied by the tenant, and he testified, without contradiction, that the under-tenant had removed according to the notice. The justice found that the premises had been knowingly sublet for the purpose of being used to carry on the lottery business, and that they had since been used and occupied for that purpose with the knowledge of the tenant, and adjudged that the lease had become void, and the final order awarded delivery to the landlord.

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From this order, the tenant appealed to the general term of the marine court (sitting, SHEA, Ch. J., NEHRBAS and HAWES, J.J.), which, in May, 1881, reversed the same, saying ; * * * "The learned judge, before whom the trial below was held, appears to us to have erred in his conception of the statutory provisions. For he, in answer to the contention of the tenant, 'that before the present proceeding was commenced, the tenant induced Lampson to leave the basement, and that by this means the nuisance has been abated, and the object of the statute satisfied,' disposes of that contention by simply saying that, 'the *statute* goes further; it imposes *as a penalty*, for its infraction, that the lease for the letting and occupation of the premises *shall become void*.' The learned judge certainly had in his contemplation, when he uttered this sentence, the first section of the statute of 1873, chapter 583 (People *ex rel.* Jay v. Bennett, 14 Hun, 63); and not the provisions of the sections of the Code, which latter is the existing law of the case, both as to the subject-matter and the remedy. We find no such language as that which did exist in the Laws of 1873, nor any equivalent in its sense, in that of the Code of Civil Procedure. On the contrary, the Code, in express terms, makes the final warrant, upon a final judicial determination, and not, as the law of 1873 did, the very time of the committal of the offense, the occasion and instant of forfeiture; and thereby the actual forfeiture, is not by mere operation of law; but concurs only with the fact of the issuing of a final warrant in pursuance of a judgment. For section 2253 of the Code expressly prescribes that, "*the issuing of the warrant for the removal* * * * *cancels the agreement, and annuls accordingly*, the relation of landlord and tenant." So, that the very language of this section and the entire title 2 of chapter 17, of which it constitutes a part, demonstrates that the judgment is not

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declaratory of a forfeiture already effected by operation of law, as under the first section of the statute of 1873. But a 'cancellation' of a lease, caused and which must be the *result* of a judicial determination. The 'canceling' of the lease and the 'annulling accordingly' of the 'relation of landlord and tenant' are effected by the execution of the judgment only. The law of 1873, and the Code cannot be construed as concurrent remedial statutes — they cannot stand together. The first deals with the offensive act as *eo instanti*, in itself a forfeiture; 'the lease *shall thereupon* become void; ' but the Code requires an existing offense — not a past and abated cause, and says that, 'where the demised premises or any part thereof, *are* used or occupied 'for any illegal business, etc., the tenant and under-tenant, etc., may be removed therefrom, as prescribed in this title.' The evident purpose of the law, as it now exists, is to abate an actual nuisance, and to cancel the lease so as to annul, for that end, the relation of landlord and tenant.

"Besides as a penal statute, we are required to strictly construe its provisions when they effect the destruction of private rights. A statute shall never have an equitable construction in order to overthrow or divest an estate, (*Van Horne v. Dorance*, 2 *Dallas*, 304, 316). The public good is served when the public nuisance is abated already, by the party who permitted the nuisance; and, so far as the forfeiture of private property is concerned, we are required (see *U. S. v. Grundy*, 3 *Cranch*, 337), to add, that when a forfeiture is given by statute, the rules of the common law are dispensed with, and the thing forfeited may either vest immediately, or upon the performance of some future act, according to the will of the legislature. This depends entirely upon the construction of the statute.

"The remedy provided now by the Code regarding only existing evil and its suppression — is in accord with

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the settled, if not elementary, principles of public policy ; for it is only in the public interest that private property is generally forfeited absolutely, and its title vests at the instant of the offense in the government, as in the case of a violation of the revenue laws, (The Mars, 1 *Garrison's R.* 191, reversed in the case of the United States *v.* 1960 Bags of Coffee, 8 *Cranch*, 398 ; Dwarris on Statutes [Potter's Ed.], 251, note 38). If the evil existed when the present proceeding was begun — had the nuisance not been already abated by the act of the tenant—then the lease might be canceled by judicial determination, to the end that the relation of landlord and tenant might be annulled and the evil abolished. The law of 1873 is, in this respect, clearly by necessary inference, abrogated." * * * And holding, in substance, that the petition itself did not in terms charge an illegal use, or occupation of the premises extending to the present time, but related wholly to a past offense ; that the first proceeding in the district court, having been brought to trial before a competent court, and no motion having been made by either side, and the evidence (which failed to show that the tenant had knowledge of the acts of the under-tenant), having been considered by the justice in reaching his conclusion, he necessarily decided the proceeding upon the merits, with the acquiescence of both parties, and the matter was *res adjudicata* ; that, in any event, the permission to renew the proceeding meant, that it might be renewed only in case the illegal act continued after August first, of which there was no evidence.

From the determination of the general term of the marine court, the landlord appealed to the general term of the court of common pleas, which dismissed the appeal, holding that there appeared to be no provision in the Code for entertaining jurisdiction of such an

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appeal, but subsequently granted a reargument, and rendered the following opinion.

Edward P. Wilder, for appellant.

David Mitchell (Joseph Ullman, attorney), for respondent.

By the Court.—*VAN BRUNT, J.*—The defendant was the tenant and occupant of certain premises belonging to the plaintiff. Prior to the first of August, a portion of the premises had been occupied by one Lampson, for the purpose of carrying on the lottery-policy business. Upon the last named date, Lampson removed from the premises, and, on the 17th day of September, 1880, the plaintiff presented her petition to Mr. Justice *McADAM*, who issued his precept to the defendant to remove from the premises because of this occupation by Lampson, or to show cause why he should not be removed therefrom. The tenant appeared upon the return day, and put in his answer; and, upon the foregoing facts being established, the justice issued his final order of removal. An appeal was taken from this order by the tenant, which was reversed by the general term of the marine court, and from the judgment of reversal, the appeal to this court has been taken.

There are two questions which it is necessary to consider:

First, whether, in landlord and tenant proceedings, an appeal lies to the general term of the court of common pleas from an adjudication of the general term of the marine court; and,

Secondly, whether such proceedings may be instituted for a violation of the provisions of section 1 of chapter 583 of the Laws of 1873, where such violation has ceased before the application is made.

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The right of appeal seems to be conferred by section 2260 of the Code of Civil Procedure. This section provides, that an appeal may be taken from a final order made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in a court of which the judge or justice is the presiding officer, and with like effect, except as otherwise prescribed by the next two sections. Section 2261 prescribes that an appeal cannot be taken to the court of appeals, from a final determination of the general term of the supreme court or of a superior city court, upon such an appeal, unless the latter court, by an order made at the general

term where the final order is made, or the next [1] general term thereafter, allows it to be taken.

These sections clearly indicate the intention upon the part of the legislature, instead of allowing landlord and tenant proceedings to be reviewed as before the adoption of the Code of Civil Procedure by *certiorari*, to assimilate the practice in proceedings for a review of a final order made in those cases and the proceedings upon an appeal from a judgment.

Section 2261, in requiring in all cases a certificate of the general term in order to entitle a party to appeal to the court of appeals, might, at first, seem to make a different regulation from what exists in reference to appeals from judgments.

However, upon a consideration of the question, it will be remembered, that no appeal can be taken to the court of appeals — even from the supreme court, general term, or the general term of a superior city court — in cases where the amount involved does not exceed \$500, unless such appeal is permitted by such general term.

In landlord and tenant proceedings, there is nothing upon the record which can possibly show that \$500 is involved; therefore the provision is inserted, that no

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appeal shall be taken in such cases to the court of appeals, unless upon an order of the general term [?] affirming such appeal. The fact that the singular number is used in section 2260 in speaking of the court to which appeals may be taken, will not, and should not, prevent this court from giving to the section that construction which it is evident that the legislature intended; viz., to provide for a uniform practice in reference to appeals in landlord and tenant proceedings and judgments, and to make them in all respects similar. If this construction is not given to the section in question, this anomaly is presented ; that in the case of a landlord and tenant proceeding commenced in a district court, an appeal may be taken to the court of appeals by and with the consent of the general term of the court of common pleas ; but in the case of a landlord and tenant proceeding commenced in the marine court, no appeal can be taken to the court of appeals under any circumstances whatever. Such a peculiarity in the law could not have been intended by the legislature, and this court should not give such a construction to the section in question, unless absolutely required so to do by its language.

[?] We are, therefore, of opinion that an appeal lies to the general term of this court from the general term of the marine court, in landlord and tenant proceedings.

The next question to be considered is, whether such proceedings may be instituted for a violation of the provisions of section 1 of chapter 583 of the Laws of 1873, where such violation has ceased before the application is made. Section 1 of chapter 583 of the Laws of 1873 provides as follows : " Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease

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or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied, and shall have the same remedies to recover possession thereof as are given by law in the case of a tenant holding over after the expiration of his lease."

[4] The last clause of this section, "and shall have the same remedies to recover possession thereof as are given by law in the case of a tenant holding over after the expiration of his lease," is expressly repealed by chapter 245 of the Laws of 1880. So far, then, as the provisions of the Laws of 1873 are concerned, in the cases in section 1 of said chapter 583, the lease is declared void, and the landlord has a right to re-enter, which he may do by his action of ejectment at law; and this is the only remedy which he has to enforce his right of re-entry under the section in question. Section 2231 of the Code of Civil Procedure states the cases in which summary proceedings for the possession of lands may be instituted; and the fourth subdivision provides that, a tenant may be removed where the demised premises, or any part thereof, are used or occupied as a bawdy house, or a house of assignation for lewd persons, or for any illegal trade or manufacture, or other illegal business.

The fact that the last clause of section 1 of chapter 53 of the Laws of 1873 was repealed in connection with the passage of the section in question, is significant, because, by the Laws of 1873, summary proceedings might be instituted at any time after the violation [5] of the provisions of those laws. By section 2231 of the Code of Civil Procedure, if the violation of the law has ceased prior to the application for the warrant, no proceedings for the summary removal of the tenant can be taken, but the landlord is remitted to his action

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for ejectment to obtain possession of the premises in case the lease has been voided by the action of the tenant; and there seems to be a good reason for this distinction, because the landlord, if he wishes to avail himself of summary proceedings, must act at once, and if he does not act at once, he cannot avail himself of those proceedings, but must proceed in the more orderly way by an action for ejectment.

This seems to have been clearly the intention of the legislature in framing the acts in question, and the change of phraseology, and the change of rights [¶] thereunder, cannot have been the result of mere accident. It seems to be, therefore, reasonably clear, that although the landlord has his action of ejectment for a violation of section 1 of chapter 583 of the Laws of 1873, he cannot avail himself of the provisions of the Code in reference to summary proceedings, unless he acts while the houses are being used or occupied for the illegal purposes complained of.

We are of the opinion, therefore, that the construction of the statute given by the general term of the marine court was correct, and that the judgment of reversal appealed from must be affirmed, with costs.

C. P. DALY, Ch. J., and BEACH, J., concurred.

Penoyer v. Browne.

PENOYER, LANDLORD, v. BROWNE, TENANT.

N. Y. MARINE COURT; CHAMBERS, JUNE, 1882.

§ 2231.

Summary proceedings.—Breach of condition subsequent cannot be enforced by ; the remedy is ejectment.—The difference between conditions in law and conditions in a deed.—How conditions tending to defeat grant are construed.

The right of re-entry by a lessor for a breach of a condition subsequent, cannot be enforced by summary proceedings, and the remedy is the ordinary common-law action of ejectment.*

Conditions in law, which are usually termed limitations, are where, in the grant of an estate, a contingency is limited, the happening of which shall *ipso facto* put an end to the estate. But a condition in a deed is merely a proviso that the grantee shall or shall not do a particular act, the breach of which condition will not, *ipso facto*, defeat the estate, but will only give power to the grantor to re-enter; and, by such re-entry, to avoid the estate.† The distinction between the two is subtle, and whether a provision is to be construed as a limitation or a condition depends upon the language employed in each particular case.

Conditions tending to defeat a grant are always strictly construed.

Example of a provision in a lease insufficient to create a conditional limitation.

Miller v. Levi (44 N. Y. 489), distinguished.

Summary proceedings to recover possession of a specific portion of a house.

This proceeding was brought to remove the tenant from a flat hired by him for occupation by himself and family; and the lease under which he held contained the following provision; viz. : "This lease is granted

* To the same effect, see *Beach v. Nixon*, 9 N. Y. 85; and see, also, *Oakley v. Schoonmaker*, 15 Wend. 226.

† For a concise statement of the difference between conditions in law and conditions in a deed, and between a condition and a limitation, see *Taylor's Landlord and Tenant*, 234-236 (7th ed.), §§ 271-278.

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upon the express condition, however, that in case said landlord, his agents or assigns, deems objectionable or improper conduct on the part of the said tenant or occupants, said landlord, his agents or assigns, shall have full license and authority to re-enter and have full possession of said premises, either with or without legal process, on giving five days' previous notice of intention so to do, and tendering repayment of the rent paid on account of the unexpired term demised; and upon the expiration of said notice and tender of payment made as aforesaid, said landlord, his agents or assigns, shall be entitled to the immediate possession thereof; and in consideration of the above letting, he, the party of the second part, consents that the said landlord, his agents or assigns, shall not be liable to prosecution or damages for so resuming possession of said premises."

Certain acts on the part of the tenant's family, alleged to have been done by and with the knowledge and consent of the tenant, were deemed disorderly by the landlord, and he gave the tenant five days' written notice requiring the surrender of possession, and repaid the amount of rent paid on account of the unexpired part of the term demised. After the expiration of the time specified in said notice, the landlord began this proceeding, claiming, on the facts, that the tenant held over and continued in possession of the premises after the expiration of his term, without the permission of the landlord.

The tenant admitted the allegations of the petition, but claimed that the demise had not expired by limitation, and that the landlord's only remedy was an action of ejectment, for a breach of a condition subsequent.

Wm. H. Haeselbarth, for landlord.

Kobbé & Fowler, for tenant.

Penoyer *v.* Browne.

McADAM, J.—The determination of this proceeding depends upon whether the provision in the lease creates a conditional limitation or a condition subsequent. The distinction between the two is subtle, and the construction must depend upon each particular case presented. Conditions in law, which are usually termed limitations, are where a contingency is limited in the grant of the estate, the happening of which shall *ipso facto* put an end to it. But a condition in a deed is merely a proviso that the grantee shall or shall not do a particular act, the breach of which will not *ipso facto* defeat the estate, but will only give power to the grantor to re-enter, and by such re-entry, to avoid the estate. The lease in question is for one year from November 15, 1881, and the provision for terminating it on five days' notice is, by the terms of the lease, made to depend on the conduct of the tenant—whether good or objectionable. If good, there was no warrant for the notice. If bad, the notice was allowable. This objectionable conduct constituted a breach of the condition, and authorized the lessor to re-enter. This right of re-entry must be enforced by the ordinary common-law action of ejectment, and cannot be coerced by summary proceedings. The distinction between this case and Miller *v.* Levi (44 N. Y. 489), although close, is yet obvious upon examination. Whether a provision is to be construed as a condition or as a limitation of the estate, must depend upon the language employed, and a slight change in the phraseology used in the present lease, might have brought it within the rule creating a limitation. But the present form of instrument creates no more than a condition subsequent. Conditions tending to defeat a grant are always strictly construed, and by applying this rule of interpretation to this case, it follows that the proceedings must be dismissed, and the landlord remitted to his appropriate remedy by action.

Estate of Filor.

ESTATE OF EMELINE R. FILOR, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK; JULY, 1882.

§ 2830.—Chap. 486 of the Laws of 1881.*

Bond of guardian of infant's property.—Corporate guaranty of, makes the same sufficient without sureties.—Intent of chapter 486 of the Laws of 1881, in regard to corporations authorized to guaranty fidelity.—What a guaranty by such corporation dispenses with.

Although section 2830 of the Code requires that before letters of guardianship of an infant's property can be issued, the person appointed as guardian must execute to the infant a bond, with at least two sureties, still by chapter 486 of the Laws of 1881, the bond of such a guardian, signed by him and guaranteed by a company authorized to guaranty the fidelity of persons holding positions of public or private trusts, is valid and legal, even without sureties. [']

It was intended by said chapter 486 of the Laws of 1881, that the corporate guaranty, if satisfactory to the officer to whom the bond was offered for approval, should supply the place, not only of justification of sureties, but of any inquiry into their sufficiency, or of any requirement of pecuniary responsibility on their part. [']

* *N. Y. Marine Court; Special Term, October, 1881.*

SWEENEY ET AL v. ROGERS ET AL.

Chap. 486 of the Laws of 1881.

In case of corporate guaranty of undertaking, no other sureties are required.—Such corporation takes the place of qualified sureties under the different provisions of the Code.—Corporation, when excepted to, must justify through its officers, as required by law of other sureties.

Determination of a question arising on exception to the sufficiency of sureties to an undertaking given to stay proceedings pending an appeal by defendants to the general term. .

A. C. Aubery, for plaintiffs.

Jas. C. Rogers, for defendants.

Estate of Filor.

Determination of a question in regard to the sufficiency of the bond of a general guardian of an infant's property.

The guardian was appointed by the surrogate of Rockland county, and the bond to the infant was signed by the guardian, and guaranteed by the Fidelity and Casualty Company of New York, a corporation authorized to guaranty the fidelity of persons holding positions of public or private trust.

The infant being entitled to certain property under a final accounting had before the surrogate of New York county, the question was raised whether the bond so executed was sufficient to entitle the guardian to receive the property, or whether the bond should not have been executed with at least two sureties, notwithstanding the guaranty of the company.

Alexander & Green, for guardian.

ROLLINS, Surrogate.—It is declared by section 2830 of the Code of Civil Procedure, that before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must execute to

McADAM, J.—The correct interpretation of the act of 1881 (chap. 486) is, that whenever "The Fidelity and Casualty Co." guaranty any bond or undertaking, no other sureties are required; that the company, by operation of said act, takes the place of qualified sureties under the different provisions of the Code, and, like them, must justify if excepted to. In fact, the act conferring this privilege upon the company, in express terms, provides, that nothing therein contained shall "prevent a justification on the part of such company, through its officers, as required by law of other sureties." This provision is a plain declaration of the legislative intent. The plaintiffs having in due form excepted to the sufficiency of the sureties, the company must (in conformity to the act), through its officers, justify as to its pecuniary sufficiency, to the end that it may be made to appear affirmatively, in the language of section 2 of the act, that its liabilities do not exceed its assets.

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the infant, and file with the surrogate, *a bond with two sureties*, in a certain specified sum.

In 1881, after the foregoing provision went into effect, the legislature passed an act, entitled, "An act to facilitate the giving of bonds required by law." (Chap. 486). It provided that in cases where a person was required by law to give a bond *with security* for the faithful performance of any duty, an officer authorized to accept such bond, and to pass upon its sufficiency, might, in his discretion, approve the same whenever the conditions of *such bond* should be *guaranteed* by a company duly organized and authorized to guaranty the same.

A question has arisen whether it is still necessary that a guardian's bond should bear the names of two sureties, or whether such a bond is in conformity with law, though it be signed by the guardian alone, if it is approved by the surrogate, and is guaranteed by such a corporation as is referred to in the act of 1881. Either view seems to be in harmony with the language of that act. But as to the meaning and intent of its provisions, whatever doubts may at first suggest themselves, will disappear, I think, upon careful examination of certain of its terms, to which reference has not yet been made.

For example, upon reading the statute as a whole, it is discovered, that it does not expressly relieve an officer who takes a guaranteed bond, from the duty of examining and determining the sufficiency of sureties. Indeed, the very absence of any distinct provision for such relief is urged as an argument against the acceptance of such bond without such sureties. But if it is still incumbent upon the officer to whom a bond is submitted for approval, to require justification of sureties in all cases, or by some inquiry to ascertain their responsibility, it was very absurd to provide that he might accept bonds whenever they were guaranteed by a duly authorized corporation. Of course he might, if they were otherwise in con-

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formity with law, and consistent with the proper exercise of his discretion. No legislation was necessary to tell him that, for nobody can ever have supposed that even a worthless guaranty could invalidate a bond which was duly executed and secured by the sufficiency of its sureties, or that the acceptance of such a guaranty upon such a bond was an illegal act, until it was expressly authorized by the legislature.

[1] It must assuredly have been intended that the guaranty of the corporation, if satisfactory to the officer to whom a bond was offered for approval, should supply the place, not only of justification of sureties, but of any inquiry into their sufficiency, or, indeed, of any requirement of pecuniary responsibility on their part. But in view of this destruction of the substance of suretyship upon guaranteed bonds, there was manifestly no advantage in retaining its form, and herein lies an argument of some force in favor of the view that a bond, which is guaranteed as required by the statute, and is duly approved, is effectual without bearing any name as surety.

This view is also supported by another consideration. Section 2 of the act provides, that the guaranty of an authorized company "shall not be accepted * * * whenever its liabilities shall exceed its assets."

Now, unless it is intended that the guaranty may supply the place of the surety, this singular anomaly presents itself: That upon a bond which scrupulously complies with the requirements of law, and bears the names of the requisite number of responsible sureties, the officer to whom it is submitted, is absolutely forbidden to accept the guaranty of any company whose liabilities exceed its assets.

[2] So many absurdities seem to result from any other interpretation of the statute, than that which vests discretionary authority in the surrogate in passing upon

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the sufficiency of a bond, under circumstances like the present, to dispense with sureties upon the due execution of a guaranty, that I must sustain the construction which would hold, that even without sureties, a bond so guaranteed is valid and legal.

ESTATE OF MARY KELLINGER, DECEASED.

SURROGATE'S COURT, KINGS COUNTY; JULY 7, 1882.

§ 2555.

Surrogates' decrees for payment of money.—Enforcement of, against executor, by process of contempt.—Such enforcement, before execution issued, is discretionary.—When contempt process should not be employed in the first instance.—To what, power to enforce obedience by contempt proceedings, should conform.—What objection on such proceedings can not be sustained.

While the surrogate may, under subdivision 4 of section 2555, enforce a decree relating to the estate of a testator and directing the payment of money by an executor, by contempt proceedings, without an execution having been issued, it is discretionary with the surrogate so to do; or, to first require the return of an execution against the property of the executor.^[*] And in the absence of any reason for a contrary course, there is no hardship in requiring an execution to be first issued against the property of the executor before attempting to enforce the decree by punishment for contempt; and, where nothing appears to show the necessity or propriety of resorting in the first instance to contempt proceedings, such proceedings will be dismissed.^[*] ^[*] ^[*]

The extraordinary power given to surrogates' courts for the enforcement of their decrees requiring the payment of money, by process of contempt, should be exercised in conformity to the liberal spirit of our legislation on the subject of imprisonment for debt.^[*]

On proceedings to punish an executor for contempt, in refusing to obey a decree requiring him to pay to legatees a proportional part of their legacies, an objection that the claims of legatees being several could not have been joined in one proceeding to obtain a decree of payment, and that the decree was, therefore, void, cannot be sustained. The

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objection does not go to the jurisdiction of the court; and, if sound, and not waived, it would, at most, be cause for reversing the decree on appeal, but it affords no excuse for disobedience.^[1] ^[2]
People ex rel. Fries v. Riley (25 Hun, 587), distinguished.

Motion to punish an executor for contempt, in having refused to obey a decree of the surrogate directing the payment of money.

The facts are sufficiently stated in the opinion.

Arthur Van de Water, for motion.

James J. Rogers, opposed.

LIVINGSTON, Surrogate.—This is an application to punish an executor for contempt of court, in refusing to obey a decree requiring him to pay to legatees a proportional part of their respective legacies.

On the return of the order to show cause why he should not be so punished, the executor appeared by attorney and moved to dismiss the proceeding.

[¹] First.—On the ground that the claims of the legatees being several, they could not join in one proceeding to enforce payment of the same, and that therefore the decree obtained in that proceeding was void.

Second.—Because an execution had not been issued on the decree, against the executor, and returned unsatisfied.

[²] In answer to the first objection, it is sufficient to say, that it cannot be taken in this proceeding. It does not go to the jurisdiction of the court. If sound, and not waived, it would, at most, be cause for reversing the decree on appeal; but it affords no excuse for disobeying it, (*Erie Railway Co. v. Ramsey*, 45 N. Y. 644).

As to the second objection, it is expressly provided that where, as in this case, the delinquent is an executor,

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and the decree relates to the estate, it may be enforced by punishing him for a contempt of court, without issuing an execution, (Code, § 2555, subd. 4).

The case of *The People ex rel. Fries v. Riley* (25 Hun, 587), is not in conflict with these views. It does not refer to decrees rendered in surrogates' courts, but to judgments for the payment of money obtained in other courts of record, which can only be enforced by execution against the property in the first instance (Code, § 1240), and, in certain cases, by execution against the person after the return of an execution against property returned unsatisfied, (Code, §§ 487 and 1489).

[³] But while the surrogate *may* enforce a decree directing the payment of money by an executor, and which relates to the estate of his testator, without issuing an execution, it is discretionary with him to do so, or, to first require the return of an execution against the property of the executor (Code, § 2555, subd. 4), and the manifest spirit of the provisions of the Code on the subject, applicable to other courts, would seem to require that he should not dispense with the preliminary issuing of the execution, without some good reason.

[⁴] The extraordinary power given to surrogates' courts to enforce obedience to their decrees for the payment of money, by punishing the delinquent for contempt of court, should be exercised in conformity to the liberal spirit of our legislation on the subject of imprisonment for debt, (*Doran v. Dempsey*, 1 Bradf. 490; *Matter of Latson*, 1 Duer, 696; *Hosack v. Rogers*, 11 *Paige*, 603; *The guardianship of Elizabeth Callahan*, 1 *Tuck.* 62).

[⁵] In the case at bar, nothing appears to show the necessity or propriety of resorting in the first instance, to the severe measure of punishing the executor for a contempt of court, for the purpose of enforcing the decree made against him, requiring him to pay money,

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which may, perhaps, be collected on an execution against his property.

If the decree in question had been obtained in the supreme court, it could be enforced only by execution, (*People ex rel. Fries v. Riley, supra*).

[¶] There is no hardship, therefore, in requiring the legatees to issue an execution against the property of the executor, before attempting to enforce the decree by punishing the executor for a contempt of court, in the absence of any reason shown for a contrary course.

[¶] The proceedings must be dismissed with costs.

Decree to be settled any Monday on three days' notice.

ESTATE OF GEORGE KING, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK; MAY,
1882.

§§ 525, 2534.

Verification of petition.—Taking of affidavits by notaries public of New York and Kings counties out of their own counties.—What must appear on face of affidavit so taken.—What is a sufficient verification.

Chapter 708 of the laws of 1872,* authorizes the notaries public of the counties of New York and Kings to exercise their functions in either of those counties; and, in the case of affidavits, if the same are sworn to before such a notary out of his own county, merely requires that there should appear somewhere upon the face of the paper the name of the county for which the notary was appointed, and none of the amendatory acts have imposed any additional restrictions in regard to affidavits.

* It was held in *Produce Bank, etc. v. Baldwin* (49 *How.* 277, 278), that chapter 807 of the Laws of 1873 made the filing of a certified copy of his appointment, by the notary, a condition precedent to the exercise of any of his functions in any county other than the one for which he was appointed, and repealed, by implication, so much of chapter 708 of the Laws of 1872 as was in conflict therewith. But see the points of counsel for the petitioner in *Estate of King, supra*.

Estate of King.

Where, in the verification of a petition, the venue was, "State of New York; City and County of New York, *ss.*" and the jurat, "Sworn to and subscribed before me, this 25th day of March, 1882; Thomas J. Clute, Notary Public, Kings Co., N. Y.,"—*Held*, a sufficient verification, although the jurat did not show that the notary had filed his certificate in the city and county of New York.

Motion to set aside a special proceeding, on the ground of insufficient verification of the petition.

The proceeding was brought by a judgment creditor to compel the executors to file an inventory and account, and the executors moved to dismiss the same on the ground, that the petition was insufficiently verified, in that the venue of the verification was, "State of New York; City and County of New York, *ss.*," and the jurat, "Sworn to and subscribed before me, this 25th day of March, 1882. Thomas J. Clute, Notary Public, Kings Co., N. Y.;" and that it should have been made to appear upon the face of the verification, that the notary was, by the filing of his certificate in the county of New York, authorized to exercise his functions in such county. As a matter of fact, the notary had filed in the clerk's office of the county of New York, a certified copy of his appointment.

M. A. Quinlan, for executors.

S. F. Higgins & G. M. Clute, for petitioner:

Urged that the only requirement of chapter 703 of the Laws of 1872, was, that the name of the county in and for which the notary had been appointed, should appear upon the face of the affidavit; that it was not necessary when such a notary exercised his functions without his own county, for him to state that his certificate had been filed in the county wherein he was then exercising his functions; and that chapter 807 of the Laws of 1873, as amended by chapters 105 and 458 of the Laws of 1875, had made no change in this respect.

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But, of course, if the notary had not, as a matter of fact, filed his certificate in the county of New York, this verification would have been insufficient, (*Produce Bank, &c., v. Baldwin*, 49 *How.* 277).

ROLLINS, Surrogate.—The petition herein purports to be sworn to before Thomas J. Clute. After his signature in the jurat, appear the words, "Notary Public, Kings county, N. Y." It is claimed that this verification is insufficient, but such claim does not seem to be well founded. The act of May 14, 1872 (Laws 1872, Chap. 703), authorized the notaries public of New York and Kings county to exercise their functions in either of those counties. This act required that in the case of affidavits, there should appear somewhere upon the face of the paper, if the same were sworn to before a notary out of his own county, the name of the county for which he was appointed; and that is all. None of the amendatory acts have imposed any additional restrictions so far as affidavits are concerned. Citations may issue, therefore, as prayed for in the petition.

CLARK, RESPONDENT, *v.* DILLON ET AL., APPELLANTS.

N. Y. COMMON PLEAS, GENERAL TERM; MAY, 1882.

§ 500.

Improper mode of denial.—What insufficient to raise an issue.—What answer must contain.—If a positive averment of a material fact is not denied, what the court is warranted in assuming.

Where, in an action of negligence, the complaint alleged, that the defendants, copartners, had made a certain excavation in the public streets; and, in so doing, had failed to take proper precautions to prevent accidents, by reason whereof the plaintiff's wife was injured; and the answer, after setting up the defense of contributory negligence on the

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part of the wife, and a release by the plaintiff, concluded by admitting the copartnership, and denying "each and every other allegation in said complaint contained, not hereinbefore specifically admitted, qualified or denied,"—*Held*, that this general mode of denial was insufficient to raise an issue, as to whether the defendants had made the excavation, and that it did not controvert the allegation of the complaint on this point; that the denial was problematical, and left for opinion that which should not have been matter of doubt, and was so loose and unsatisfactory, as to warrant the court in disregarding the claim, that it constituted a denial of having made the excavation.

An answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant; by this plain rule, which commends itself for simplicity, directness and clearness, the pleading must be judged. Neither the court nor opposing counsel should be called to speculate upon what allegations have been specifically admitted or denied; and, in this general form, what may or may not be qualified, is a proposition which might admit of great divergency of opinion. If a positive averment of a material fact is not worthy of a direct denial, the court is warranted in assuming that no issue is made upon the fact so averred; and this general form of denial, which is used by pleaders as a drag-net to include that which may otherwise have been omitted, is to be condemned.*

(Decided June 5, 1882.)

Appeal by defendants from a judgment entered upon a verdict.

This action was brought by Albert Clark, the husband of Letitia A. Clark, to recover damages for a personal injury to the said Letitia A. Clark, alleged to have been caused by the negligence of the defendants.

The complaint set forth, in substance, that the defendants, as copartners, were at the time of the injury to the plaintiff's wife, engaged in the work of sinking the road-bed of the N. Y. & H. R. R. Co., and that they had excavated large quantities of earth in Fourth ave. near the intersection of Sixty-third street, and negligently

* See 1 *Civ. Pro. R.* 252-255, note. But in *Calhoun v. Hallen* (25 Hun, 155), it was held that an answer denying "each and every allegation set forth in the complaint, except as herein admitted, qualified or explained," contained an authorized form of denial, and should not be stricken out as frivolous.

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and wrongfully neglected to surround the excavation so made by them with barriers, and had left the same uncovered and unprotected, and had negligently omitted to provide any lights, signals or devices to notify or warn pedestrians, or persons passing through or along said avenue and street, of the location or existence of such excavation, and that the plaintiff's wife, while lawfully and necessarily passing along Sixty-third street, at night, fell into said excavation, without any fault or negligence on her part, or on the part of the plaintiff, and was thereby injured.

The first statement of the answer set forth ; "That the alleged injuries charged in said complaint, as having resulted to Letitia A. Clark therein named, were brought about, caused and contributed to by said Letitia A. Clark." The second statement set forth, that in a prior action brought by said Letitia A. Clark, to recover damages growing out of the same occurrence, the husband had promised and agreed to waive any claim on his part, if the defendants would settle the action prosecuted by the wife, and that such settlement had been made. The third and last statement set forth ; "They admit the co-partnership, * * * and they deny each and every other allegation in said complaint contained, not hereinbefore specifically admitted, qualified, or denied."

The action came on to be tried before VAN HOESEN, J., and a jury, and the plaintiff proved the injury and its cause, and gave evidence as to the extent of his damage; but no evidence was given by him to show, that the defendants made or caused to be made, the excavation into which his wife had fallen, and on this ground the defendants made a motion to dismiss the complaint, which was denied and an exception taken.

The judge charged the jury as follows :—

"In this case, the plaintiff states in his complaint, that the defendants made the excavation in which Mrs.

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Clark fell, and at night-time failed to guard it, and that their failure to guard it as it should have been guarded, was an act of negligence on their part. The defendants, in their answer, do not anywhere deny that they made the excavation ; but they do say, that the accident would not have occurred if the wife of the plaintiff had not contributed to it by a want of care on her part. I do not regard that as a denial of the allegation of the complaint, that the defendants did make the excavation, and that they left it unguarded. I construe it to be a qualification of the complaint — a qualification to the extent of saying that it was the fault of Mrs. Clark that she fell in ; and it being her fault, and she having contributed to the injury, as well as the defendants, that the husband is not entitled to recover in this case. Therefore, I say, the question for you to decide is — not whether the defendants made this excavation — for that, I think, is practically not denied — but the question is, whether Mrs. Clark was guilty of a want of care on her part that occasioned the injury for which the husband sues.” * * *

The defendants requested the judge to charge that ; “Before the plaintiff can recover, the jury must determine, as a matter of fact, that the defendants made, or caused to be made, the excavation into which the plaintiff's wife fell.” To this, the court answered, addressing the jury ; “I say that is a question which I do not think is practically before you. As I construe the pleadings, it is fairly before you, that they did make that excavation.” To this the defendants excepted.

The jury brought in a verdict for the plaintiff.

Alexander Thain, for appellants.

T. C. Cronin, for respondent :

Cited on the point here decided, *Miller v. McCloskey*,
1 Civ. Pro. R. 252 and note.

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By the Court. — BEACH, J.—The defendants' counsel asked the trial Court to charge the jury that, before the plaintiff could recover, they must determine the defendants made the excavation as matter of fact. No direct evidence was given of the fact. The learned judge held there was no denial of the allegation upon the subject in the complaint. The sufficiency of the pleading, to raise such an issue, is the question presented by this appeal. An answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, (*Code Civ. Pro.* § 500, *subd.* 1). This is a plain rule, by which the pleading must be judged, and commends itself by simplicity, directness, and the clearness resulting from adherence by the pleader. Under the text of the answer, the denial is problematical, leaving for opinion what should not be matter of doubt. Neither Court nor opposing counsel, should be called upon to speculate upon what allegations of a complaint have been specifically admitted or denied, and what may or may not be qualified, is a proposition whereon there may be great divergence of opinion. This mode of denial has been heretofore condemned, and is so loose and unsatisfactory, as to warrant the Court, as was done here, in wholly disregarding its claimed effect. Its use by the pleaders is for a dragnet, to include what may possibly have been otherwise omitted. If a positive averment of a material fact is not worthy of a direct denial, the Court is warranted in assuming that no issue is made upon it. (*Miller v. McCloskey*, 1 *Civ. Pro. R.* 252; *Hammond v. Earle*, 5 *Abb. N. C.* 105.) The judgment should be affirmed with costs.

C. P. DALY, C. J.; and VAN BRUNT, J., concurred.

Higgins v. Chrichton.

HIGGINS, APPELLANT, *v.* CHRICHTON ET AL.,
RESPONDENTS.

N. Y. COMMON PLEAS, GENERAL TERM; MAY, 1882.

§§ 484, 488.

Demurrer for improper joinder of causes of action. — Causes of action must affect all the parties. — As to certain defendants, to set aside chattel mortgages, and as to another defendant, to compel the foreclosure of a valid chattel mortgage, cannot be joined. —

Failure to state a cause of action, as to one defendant, is no answer to demurrer of other defendants.

Where the plaintiff, the assignee of certain judgments against the defendant Chrichton, brought an action to set aside as fraudulent two chattel mortgages made by the defendant Chrichton to two of the other defendants, and also to set aside as fraudulent, a general assignment for the benefit of creditors made by the defendant Chrichton to another of the defendants; or, in default of relief setting aside such mortgages and assignment, that they be postponed to the lien of the plaintiff's judgments; and as against another defendant, one Close, who, on the plaintiff's own showing, held a valid chattel mortgage upon the property of the defendant Chrichton, that his mortgage be foreclosed and the surplus arising therefrom be applied upon the judgments possessed by the plaintiff, — *Held*, affirming the judgment of the special term rendered on demurrer by all the defendants except Close, that the causes of action united in the complaint — the one for fraud affecting the assignment and the chattel mortgages, and the other against the owner of a valid incumbrance — did not affect all the parties to the action; and, consequently, under section 484 of the Code, were not capable of being joined.^[1]

Held, further, that it was no answer to the objection that causes of action had been improperly united, that the complaint did not state a cause of action against the defendant Close; that the plaintiff having assumed to allege one, he could not claim his failure as a shield when the complaint was questioned by the other defendants; ^[2] that whether or not a cause of action was set forth against the defendant Close must depend upon an adjudication, and until decided to the contrary, it must be deemed sufficient.^[3]

(Decided June 5, 1882.)

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Appeal by plaintiff from a judgment of the special term dismissing the complaint, entered upon an order sustaining demurrers.

This action was in the nature of a judgment creditor's action ; and, as to all of the defendants except Close, was brought to set aside various mortgages and assignments alleged either to be fraudulent in themselves, or, by a confederacy of such defendants, to have been put to a fraudulent use in obstructing and defeating the satisfaction of certain judgments against the defendant Chrichton, of which the plaintiff was the assignee.

All of the defendants, except Close who answered, demurred on the ground, among others, that causes of action had been improperly united, in that it did not appear upon the face of the complaint that the causes of action set forth affected all of the defendants to the action.

The demurrers were sustained, although the cause of action against Close was fatally defective in substance ; and an order was made granting the plaintiff ten days in which to serve an amended complaint, and, in default of such service, that judgment be entered for the demurants dismissing the complaint. The plaintiff failed to serve such complaint, and judgment was accordingly entered, from which the plaintiff appealed, and brought up for review the order sustaining the demurrers.

The other facts are sufficiently stated in the opinion.

John Brooks Leavitt, for appellant :

Urged upon the points here decided, that the only defendant who had the right to demur was Close ; that a demurrer did not lie for an excess of, but only for a defect in, parties ; that if a person was joined as defendant, who should not have been so joined, his remedy was by answer, or if no cause of action was alleged against him he might demur on that ground ; but, if

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there was but one good cause of action in the complaint, and it did not apply to Close, the plaintiff could not recover against him, but that could afford the other defendants no proper ground for demurrer; that even if a demurrer were proper, it should have been a joint one by Close and the other defendants, on the ground that no cause of action had been alleged against them jointly.

A. M. O'Neil, for one of respondents.

James M. Lyddy, for the other respondents.

By the Court. — BEACH, J. — This appeal is from a judgment entered upon decision sustaining the demurrs of certain defendants to the complaint, upon the ground, among others, of improperly uniting causes of action. The plaintiff is assignee of judgments against the defendant, Thomas J. Chrichton. Two of the other defendants who demur are alleged to hold chattel mortgages upon the debtor's personal property. These liens, and a general assignment for the benefit of creditors, to another defendant, are sought to be set aside as fraudulent; or, in default of that relief, to be postponed to the lien of the plaintiff's judgments. The defendant Close is averred to hold a valid chattel mortgage, and the only relief prayed against him is its enforced foreclosure, and the application of any surplus upon plaintiff's judgments. The cause of action against the defendants, other than Close, seems to be founded on fraud. The complaint is barren of allegation charging him with fraudulent action, prejudicial to plaintiff's rights under his judgments, and the validity of his security is not [1] impeached. The causes of action united in this pleading — the one for fraud affecting the assignment and chattel mortgages, the other against Close, the

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owner of a valid incumbrance — do not affect all the parties to the action, and, consequently, are not [¶] capable of joinder (Code Civil Pro., § 484). It is not an answer to the objection, that no cause of action is stated against Close. The pleader has assumed to allege one, and cannot claim failure for a shield, when the pleading is thus questioned by other defendants.

[¶] Whether or not a cause of action is set forth against Close, depends upon adjudication by the court. Until so decided its averment must be deemed sufficient.

The judgment should be affirmed, with costs.

C. P. DALY, Ch. J., and VAN BRUNT, J., concurred.

MACHEN, RESPONDENT, v. LAMAR INSURANCE CO., OF N. Y., APPELLANT.

COURT OF APPEALS; MARCH, 1882.

§ 1003.

New trials by appellate courts for errors in admission or rejection of evidence.—In common law actions rule as to, has not been changed by section 1003 of the Code.—Section 1003 of the Code applies only to evidence in equity causes.

The rule of law applicable to the granting of new trials by appellate courts, for errors committed in the admission or rejection of evidence upon the trial of actions at common law, has not been changed by section 1003 of the Code of Civil Procedure. [¶] This section applies only to cases in equity where issues have been framed to enable the court to have the aid of a jury in determining the facts, and has no application to exceptions taken upon the trial of a common law action. [¶]

(Decided April 11, 1882.)

Appeal by defendant from a judgment of the general term of the supreme court, fourth department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Mere memorandum below, 24 Hun, 485.)

The opinion sufficiently states the facts.

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Hancock & Munro, for appellant :

There was no evidence that any article identical with, or even similar to, those mentioned in the estimate of the witness, Herrick, was destroyed or injured. The estimate was the mere declaration of a stranger, based upon conjecture and not upon any state of facts shown to exist. Its admission was error for which the judgment should be reversed ; *Stuart v. Binsse*, 7 *Bosw.* 195 ; *Commonwealth Ins. Co. v. Sennett*, 41 *Pa. St.* 161 ; *Lycoming Ins. Co. v. Schreffler*, 42 *Id.* 188 ; *S. C.*, 44 *Id.* 269 ; *Newmark v. Liverpool and London Ins. Co.*, 30 *Mo.* 180 ; *Woodward v. Paine*, 15 *Johns.* 493 ; *Westlake v. St. Lawrence County Mutual Ins. Co.* 14 *Barb.* 206, 213 ; *Russell v. Hudson R. R. Co.*, 17 *N. Y.* 134 ; *Peek v. Martin*, 15 *Hun.* 470 ; *Wilde v. Hexter*, 50 *Barb.* 448 ; *Marcly v. Shults*, 29 *N. Y.* 346. The evidence of the witness, Ingoldsby, did not cure the error of admitting the estimate ; *De Groot v. Fulton Fire Ins. Co.*, 4 *Robt.* 504 ; *Worrall v. Parmelee*, 1 *N. Y.* 519.

Section 1003 of the Code applies only to equity cases (*Schoonmaker v. Wolford*, 20 *Hun.* 163, 168 ; *Foote v. Beecher*, 78 *N. Y.* 155, 158), and has not altered the rule that the judgment must be reversed, in a common-law action, for an error committed upon the trial, unless the prevailing party shows affirmatively that the error could not possibly have affected the verdict ; and the burden of showing that the error has not had this influence, is upon the prevailing party ; *Greene v. White*, 37 *N. Y.* 405 ; *Anderson v. R. W. & O. R. R. Co.*, 54 *N. Y.* 334 ; *Wardell v. Hughes*, 3 *Wend.* 418. Where the error is the admission of evidence which bears, in the least degree, upon the question at issue, it cannot be disregarded ; *Worrall v. Parmelee*, 1 *N. Y.* 519.

Hiscock, Gifford & Doheny, for respondent.

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TRACY, J.—This action was brought upon defendant's policy of insurance against loss by fire to the plaintiff's building and personal property. The policy was for \$1,500. There was a concurrent policy issued by the Manufacturers' Insurance Company upon the same building and property for a like amount. Part of the building covered by the policy was used as a wagon shop and part as a cider mill. The machinery and tools in the building were included in the policy.

The cause and all the issues therein were referred to a referee.

There was much conflict of evidence as to the value of the building and the machinery and tools; the witnesses for the plaintiff and for the defendant differing widely in their estimates of value.

The referee found the total loss to be \$2,360, and charged one-half to the defendant. On the trial, the plaintiff called, among other witnesses one Herrick, a manufacturer of iron machinery, who, a few weeks before the trial, had visited the plaintiff's place and examined the ruins. He saw some iron screws and shafting which had been burned and damaged, but not destroyed. He made no inventory. Several months before this visit, this witness made an estimate in writing of the cost of replacing all the machinery claimed to have been in the building. This estimate was made by the witness without any personal knowledge of the machinery, or whether the articles included therein were ever in the building. The plaintiff described the machinery to him, and his estimate was made from such description. He was then asked to state the amount of his estimate. This question was objected to as incompetent, immaterial and irrelevant, not based upon the knowledge of the witness, and as not calling for the true measure of damages. The objection was overruled,

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to which ruling the defendant excepted. The witness then answered, "Footings of estimate, \$430."

The written estimate made by this witness, containing a detailed list of many articles, with their size, general description and cost of each, was then offered and received in evidence under a similar objection. From this estimate, and from the evidence of the witness, it appears that much of the machinery estimated for was wood-work. The iron screws were not included in the estimate, but the iron shafting was. The shafting the witness says he saw was a little bent, but when straightened would be as good as new; this, he said, could be done at the nominal cost of a few dollars; but the witness' estimate included the cost of new shafting, in place of that which was only damaged, as well as the cost of new wood-work, which was entirely consumed by the fire. Among the articles mentioned in the estimate was a "boring machine," value placed at \$50. The witness said that a boring machine might cost from \$5 to \$500.

The plaintiff, although examined as a witness, was not asked whether he correctly described to Herrick the articles included in the latter's estimate, nor did he testify that the machinery included in such estimate, with the exception of two or three articles, was in the building at the time of the fire.

The witness Ingoldsby testified that a portion of the articles, which he names, were in the building two years before the fire.

This is the only evidence in the case showing, or tending to show, that the articles contained in Herrick's estimate were in the building at the time of the fire. There is no evidence showing that all the articles estimated for by the witness were in the building. We think this evidence was improperly admitted. No sufficient foundation had been laid to justify the admission of

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this evidence. It was material, for it bore directly upon one of the main issues of fact in the case. But, in the absence of evidence proving that such articles as were included in the estimate were in the building at the time of the fire, the evidence was incompetent.

For this error, a new trial must be granted.

- [1] Section 1003 of the Code of Civil Procedure has no application to exceptions taken upon the trial of a common law action. It applies only to cases in equity where issues have been framed to enable the court to have the aid of a jury in determining the facts.
- [2] The rule of law applicable to the granting of new trials, by appellate courts, for errors committed in the admission or rejection of evidence upon the trial of actions at common law, has not been changed by this section of the Code.

As this leads to a reversal, it is unnecessary to consider and determine the other questions discussed upon the argument.

All concurred, except RAPALLO, J., absent.

People *ex rel.* Browne *v.* McAdam.

THE PEOPLE EX REL. BROWNE, APPELLANT, *v.*
McADAM, JUSTICE, AND ANO., RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT; GENERAL TERM,
MAY, 1882.

§§ 2091, 2231.

Writ of prohibition in summary proceedings.—When inquiry arising on allegations of petition in summary proceedings, is a proper one for consideration.—When writ should not be resorted to.—What will not be presumed in support of writ.—It will not lie when appeal would afford protection to tenant's rights.*

In a case apparently within the provisions of the statute in relation to summary proceedings, and where the officer before whom the proceeding is brought has authority to entertain it and to make a judicial determination thereon, the inquiry arising under the allegations of the petition is a proper one for the consideration of the officer, even though the case made by the petition might not, on the merits, be broad enough to bring it within the application of the provisions of the Code, and it would be so adjudicated on deliberation. And in support of a writ of prohibition to restrain such a proceeding prior to a determination thereof being made by the officer before whom the same is pending, on the ground that the petition does not show a case wherein such proceedings may be employed, it is not to be presumed that the officer will improperly determine the proceeding; and mere apprehension that he will so do does not warrant a resort to the writ. The regular course of procedure requires the tenant to appear before the officer, and either deny the facts set forth as the foundation of the proceeding, or to move for its dismissal because of the insufficiency of the cause assigned for his removal.

Although, in such a case, an erroneous decision may be made against the tenant, and the application to remove him be sustained when it should have been dismissed, he has the same remedy for the correction of this

* *Quære*, whether injunction is not the only proper means of restraining summary proceedings, under section 2265? See note on injunctions in summary proceedings, 1 Civ. Pro. R. 425-443, and People *ex rel.* Cook *v.* Parker, *Id.* 444. But see cases cited, *Id.* 432.

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error as for any other improper determination made in the course of the proceeding, and he should be confined to that mode of redress when it can be seen that it will afford him all the protection which his rights entitle him to claim.

(Decided May 27, 1882.)

Appeal by relator from a final order of the special term denying a motion to make an alternative writ of prohibition, restraining summary proceedings, absolute; and remanding such proceedings for further consideration.

The writ was granted to restrain the consideration of the summary proceeding described *ante*, p. 61, and the condition of that proceeding, at the time when the writ was served, is set forth in the justice's return to the writ, as follows: * * * "That on the 6th day of April, 1882, on the return of said precept, the respective parties appeared by counsel. The tenant's counsel stated that he had not been able to prepare his points or counter affidavit, and moved to adjourn the proceeding. Upon consent of the respective counsel, the proceeding was thereupon adjourned until April 10, 1882, at 2 P. M., the counter affidavit to be filed in the meantime, and the questions of law to be discussed upon the adjourned day. Upon the adjourned day, the tenant's counsel served the annexed writ."

"No argument was had before me, no objections were discussed, and I have not been called upon to make any ruling, nor have I passed upon any of the questions involved herein." * * *

The application for the writ proceeded upon the theory that, as the petition set forth the breach of a condition subsequent, the only remedy for which was re-entry by an action of ejectment, it did not show upon its face a case wherein summary proceedings could be employed, and that the tenant was, on the landlord's own showing, rightfully in possession as the term for which the

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premises were demised had not expired by limitation, and that therefore the justice was wholly without jurisdiction to entertain the proceeding, and that the tenant's direct and immediate remedy was the writ of prohibition.

Ludlow Fowler (*Kobbé & Fowler*, attorneys), for appellant:

Summary proceedings will not lie for a breach of a condition subsequent, and the only remedy is by an action of ejectment; *Beach v. Nixon*, 9 N. Y. 35; *Oakley v. Schoonmaker*, 15 Wend. 226, 229; *Linden v. Hepburn*, 5 How. 188; *Clark v. Jones*, 1 Denio, 516.

Prohibition was the tenant's remedy to restrain the proceeding; *Quimbo Appo's Case*, 20 N. Y. 531, 540; *People ex rel. Faile v. Ferris*, 76 N. Y. 326, 328, 329.

The case of *Miller v. Levi* (44 N. Y. 489), does not conflict with *Beach v. Nixon*, *supra*. In the former case, the lease was to terminate on a written notice at the end of a year; but, in the case at bar, there is no limitation independent of the condition subsequent; and the notice has no effect on the demise, except to show that the landlord elected to profit by the breach of the condition subsequent.

Summary proceedings are in derogation of the common law, and must be strictly construed; *Benjamin v. Benjamin*, 5 N. Y. 383, 385.

Wm. H. Haeselbarth, for respondents.

Per Curiam. — The object desired to be accomplished by the issuing of the writ was, to prohibit the justice, to whom it was proposed to direct it, from entertaining summary proceedings to remove the relator from the possession of certain demised property. The application for that purpose was based upon the misconduct of the tenant in the use of the property, and for withhold-

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ing it from the petitioner after the service of a notice, which it was provided by the terms of the lease, should terminate the tenancy. In a case, therefore, appearing to be within the provisions of the statute, and which the officer to whom it was made was authorized to entertain, and to make a judicial determination upon it (Code Civil Procedure, § 2234).

Whether the case, as it was stated in the petition, was sufficient within the provisions made by section 2231 of the Code, it is not actually necessary now to decide ; although it seems to have been, so far as it depended upon the right of the petitioner to repossess himself of the property after the expiration of the time mentioned in the notice (Matter of Miller *v.* Levi, 44 N. Y. 489.)

However the merits may be viewed, the inquiry arising under the allegations of the petition was a proper one for the consideration of the officer to whom it was directed. For the tenant could be lawfully removed from the demised premises if they had been devoted to any illegal business other than the purposes specifically mentioned in subdivision 4 of section 2231 already referred to, or in case he held over after his term had ended, under the limitation provided for by the terms of the lease.

The case possibly may not be broad enough to bring it within either of the provisions of this section. But even if it should be so construed, it will not follow that the relator is entitled to restrain its prosecution by means of the writ of prohibition. For it would still be one which the officer to whom the petition was presented could lawfully consider, and it is not to be assumed, in support of such an application as the present, that he would improperly determine it. The regular course of the proceeding, as it has been provided for, required the tenant to appear before the officer, and either deny the facts set forth as the foundation of the proceeding,

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or move for their dismissal because of the insufficiency of the causes assigned for the removal of the tenant.

It is true that an erroneous decision may be made against him, and that such an application may be sustained when it should be dismissed. But for the correction of the error, the same remedy has been provided as the tenant is entitled to resort to for the correction of any other improper determination in the course of such a proceeding;* and he should be restricted to this mode of redress when it can be seen, as it plainly can in this case, that it will afford the tenant all the protection which his rights may entitle him to claim.

It was not contemplated that he should resort to this writ of prohibition from the mere apprehension, that the case before the officer entitled to entertain it, might be improperly decided against him. Something further than such a possibility should be made to appear, before this court can legally be expected to interfere with the proceedings by issuing a writ of prohibition. As it was progressing before the officer, it was in entire accordance with the provisions adopted for this purpose by the Code of Civil Procedure, and the tenant should avail himself of the means of protection which have been so prescribed, and which are sufficient to prevent injustice being done to him, instead of applying for the intervention of this court to arrest the proceeding, when no real necessity for its interference has been made to appear.

No such case was made out as would warrant the issuing of a writ of prohibition, and the order made should therefore be affirmed, with \$10 costs and the disbursements.

BRADY and DANIELS, JJ., sitting.

* Appeal is now the remedy (section 2260), that mode of review having been substituted for *certiorari*. See Mr. Throop's note to section 2261 of his edition of the Code.

Dusenbury v. Dusenbury.

DUSENBURY AND ANO., RESPONDENTS, v. DUSENBURY, ADMINISTRATOR, &c., APPELLANT.

N. Y. COMMON PLEAS, GENERAL TERM; MARCH, 1882.

§§ 481, 713, 1207.

Receiver pendente lite.—Appointment of, when not sustained on concurrent requests in answer and reply.—Demand for relief not binding on suitor.—When demand given controlling effect.—In accordance with what, judgment is given.

When the appointment of a receiver *pendente lite* was a part of the relief* demanded by the defendant, in his answer, and the plaintiffs, in their reply, also demanded such appointment, and then, on these concurrent demands only, moved for the appointment of such receiver,—*Held*, reversing the special term, that the plaintiffs' application not having been brought within the provisions of subdivision 1 of section 713 of the Code, the appointment could not be sustained on the concurrent demands.

A party should ask that relief to which he supposes himself entitled; but, by so doing, he is not precluded from declining to take any part of such relief, or from demanding additional relief warranted by the facts. Judgment is given by the court in accordance with the facts, and not the requests of the suitors.

The demand for relief is given controlling effect, only when there is no

* From Mr. Throop's notes to sections 481 and 1207 of his edition of the Code (1880) it seems that, strictly speaking, the use of the term "relief," as applied to that aid which the suitor demands as a conclusion supposedly following from the facts set forth in his pleading, is no longer proper. Subdivision 3 of section 481 is as follows: "A demand of the judgment to which the plaintiff supposes himself entitled." And he says in his note to this section: * * * "In subdivision 3, 'judgment' has been substituted for 'relief,' the latter expression having led to much confusion, especially with respect to prayers for provisional remedies, etc." * * * And in his note to section 1207 he says: "Co. Proc., § 275. The material portions of the original section have been preserved intact, except that the word 'judgment' has been substituted in place of 'relief,' in accordance with the plan followed throughout this act." *

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answer; then, judgment cannot exceed that which is asked for in the complaint; but, if an answer is interposed, the court grants any relief within the case shown by the complaint and embraced within the issue. (*Decided June 5, 1882.*)

Appeal by defendant from an order of the special term appointing a receiver *pendente lite*.

This action was brought by the plaintiffs as the alleged surviving partners of the firm of Thomas Dusenbury & Sons, against the defendant, as the administrator of Thomas Dusenbury, deceased member of said firm, to recover possession of the assets of said firm, or for damages in case delivery thereof could not be had.

The answer admitted possession of the property claimed, put in issue the fact of partnership and set up a counterclaim; and, among other demands for relief, including an accounting, prayed that pending the action which would determine the ownership of the property, a receiver might be appointed. The plaintiffs, in their reply, among other demands for relief, also prayed for the appointment of a receiver as demanded by the defendant. Because of these concurrent requests for the same relief, the plaintiffs moved for the appointment of a receiver, although there was nothing in the motion papers showing that there was danger that the property claimed would be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed. The defendant opposed the motion, but a receiver was appointed.

Ira D. Warren, for appellant:

A receiver cannot be appointed before final judgment, except in a case within subdivision 1 of section 713 of the Code. *Goodyear v. Betts*, 7 *How.* 187; *Gregory v. Gregory*, 33 *N. Y. Super.* 1, 39; *Patten v. The Accessory Transit Company*, 4 *Abb.* 235. It does not appear that the property in dispute is not as safe in the

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hands of the administrator as it would be in those of a receiver; and the administrator having already given security on his appointment by the surrogate, is the proper person to hold the property pending the determination of the action. Because the defendant in his answer has asked for the appointment of a receiver, he cannot, for that reason alone, be compelled to accept one; it is only in a case provided for by law that a receivership can be created.

Hall & Blandy, for respondents:

Urged, on the point here decided, that the defendant having first asked for the appointment of a receiver and the plaintiffs having united in such request, it was equivalent to a consent that the appointment be made, and the defendant was now estopped from questioning its validity; that, under these circumstances, it was not necessary to bring the application within subdivision 1 of section 713 of the Code.

By the Court.—BEACH, J.—The learned counsel for the respondents admits that the order cannot be sustained save upon the concurrent demands in the answer and reply. The motion papers do not bring the case within the provisions of the Code authorizing the court to grant such an order (*Code of Civ. Pro.* § 713, *subd.* 1). I am of opinion the learned court below gave an effect to the defendant's demand for relief much greater than is warranted by its nature or force. A party should ask any relief to which he supposes himself entitled.* But his so doing does not preclude him from declining to take any part thereof, nor from demanding aught additional supported by the facts. Neither is the court limited, in awarding judgment; that is given in accord with the facts, and not the requests of the suitor. A

* Section 481, subd. 8.

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different principle would make the action of the court subordinate to the wish of parties instead of the rules of law or practice. This portion of a pleading is given controlling effect but in one instance. It is when there is no answer, the judgment must be restricted to what is asked for in the complaint. If an answer is interposed, the court grants any relief within the case shown by the complaint, and embraced in the issue.* The order should be reversed, with costs.

J. F. DALY and VAN HOESEN, JJ., concurred.

ESTATE OF JOHN SEXTON, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK, JUNE, 1882.

§§ 2557-2567, 3347, 3352, 3356.—Chap. 245, Laws of 1880.

Costs in surrogates' courts.—Until when costs do not accrue.—By what to be taxed, when proceeding begun before and terminated after Code of Civil Procedure.—The word "proceedings" and the phrase "proceedings in a special proceeding," contained in subdivision 11 of section 3347, defined.—Determination of right to costs is not a matter of procedure.

It is a long established doctrine that costs do not accrue until the termination of the action in which they are taxable; and the saving of accrued rights by chapter 245 of the Laws of 1880, and section 3352 of the Code, does not apply to costs. [']

In a proceeding begun in a surrogate's court before the enactment of chapter 18 of the Code of Civil Procedure, and terminated after such chapter became effective, the costs and allowances should be adjusted according to the provisions of the Code of Civil Procedure (§§ 2557-2567), which fix the standard of taxation.

The word "proceedings" in the phrase "regulates the proceedings to be taken in an action or a special proceeding, and the effect thereof," contained in subdivision 11 of section 3347 of the Code, qualifying the application of certain parts thereof, so far as the provisions of that subdivision are applicable to the taxation of costs in surrogates' courts, is

* Section 1207.

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substantially equivalent to the expression, *modes of procedure*; and the phrase *proceedings in a special proceeding*, means the forms by which the various steps in a special proceeding are conducted; and an application for an award of costs, in a surrogate's court, is a proceeding in a special proceeding.^[1] While any forms or modes of procedure in relation to applications for costs, which may be prescribed in the former statutes, must still prevail so far as relates to proceedings begun prior to August 31, 1881,^[2] the determination of the question whether or not there exists any right to costs, and if so, the ascertainment of the amount thereof, are not, in any sense, matters of procedure.^[3] And the provisions of the Code declaring under what circumstances costs may be allowed, and the limits of each allowance, are not provisions which regulate the proceedings to be taken in a special proceeding.^[4] And ever since September 1, 1880, sections 2557-2587 have been in full force, and applicable to all cases, without regard to the time when the surrogate's court first acquired jurisdiction.^[5]

Determination of a question arising on an application for an award of costs and allowances.

The decedent's real estate was sold on the application of the administrator, under 3 Revised Statutes, 108 [6th ed.], section 1, *et seq.*, for the purpose of discharging debts against the estate; and the sale was made by a freeholder. The other facts are sufficiently stated in the opinion.

John McKeon & Frederick Smyth, for application.

ROLLINS, Surrogate. — This is an application for costs and allowances. Proceedings upon a petition for leave to sell decedent's real estate were commenced in November, 1879, and have just been concluded. In the interval, the present Code of Procedure has become law. Upon this state of facts, the question arises, should the costs in this proceeding be adjusted by the laws which the Code has replaced, or by the Code itself? Manifestly by the latter, unless the former, which have been in terms repealed, still survive for such purposes as the present.

When the first steps were taken for the sale of this real estate, and at all times thereafter until after August

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31, 1880, there were in force two statutory provisions, and two only, in relation to costs and allowances to parties and counsel in surrogates' courts. One of these was contained in part 3, chapter 2, title 1, section 10 of the Revised Statutes. It was as follows: "In all cases of contest before a surrogate's court, such court may award costs to the party in the judgment of the court entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of such controversy." The other statutory provision in force when this proceeding began was section 9, chapter 359, Laws of 1870. It declared that the surrogate of New York county might "grant allowances, in lieu of costs, to counsel, in any proceeding before him, in the same manner as are now prescribed by the Code of Procedure in civil actions."

These statutes were both expressly repealed by the general repealing act which took effect simultaneously with the Code of Civil Procedure (Chap. 245, Laws 1880). By section 3 of that act it was, however, declared that such repeal "does not affect any * * * right * * * lawfully accrued or established before this act takes effect." * * *

Section 3352 of the Code also contains a provision in almost precisely the same words.

As a claim for costs and allowances may, in some sense, be regarded as a "right," even though the granting or withholding them may be discretionary, the question naturally suggests itself, whether, by this saving of accrued rights, the repealed statutes still furnish the standard by which this application must be tested.

[¹] That such is not the case appears from a great multitude of decisions. The doctrine has been long established in this State and elsewhere, that costs do not accrue until the termination of the action to which they

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relate. (*Supervisors v. Briggs*, 3 *Den.* 173; *Rich v. Husson*, 1 *Duer*, 617; *Smith v. Castlers*, 5 *Wend.* 81; *Brooklyn Bank v. Willoughby*, 1 *Sandf.* 669; *Scudder v. Gor*, 18 *Abb. Pr.* 207; *Moore v. Westervelt*, 14 *How.* 279; *Ackley v. Tarbox*, 19 *Abb. Pr.* 119; *Stewart v. Lamoreaux*, 5 *Abb. Pr.* 14; *Hunt v. Middlebrook*, 14 *How.* 300; *Rader v. Southeasterly Road District*, 36 *N. J. Law*, 272; *Theriot v. Prince*, 12 *How.* 451).

There is one other provision in the general repealing statute, and only one, which is claimed to have a bearing upon the present contention.

Section 3 of that act declares in its subdivision 5, that the repeal does not affect any future proceeding taken pursuant to law, in an action or special proceeding.

Similar words of limitation are found in the Code itself, which provides (sec. 3356) that chapter 18 relating to surrogates' courts, and among other things, to costs and allowances therein (secs. 2557-2567), shall take effect September 1, 1880, "subject to the qualifications," contained in certain "foregoing sections."

The "foregoing sections" referred to, so far as relates to the matter under discussion, are section 3352, which has already been discussed, and section 3347. Section 3347 declares, that so much of chapter 18 as "regulates the proceedings to be taken in an action or a special proceeding, and the effect thereof," applies only to an action or a special proceeding commenced on or after the 1st day of September, 1880.

[To this rule certain exceptions are specified, but the sections referring to costs in surrogates' courts (sec. 2557 to sec. 2568, *supra*) are not within the exceptions.]

So far, therefore, as concerns cases originated in this court prior to September 1, 1880, the Code provisions authorizing costs and allowances and fixing the standard of taxation are not applicable, if it can justly be claimed that those provisions are "regulations" of the "pro-

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ceedings to be taken in a special proceeding," and of "the effect thereof."

[?] What is the meaning of the word "proceedings" in the phrases just quoted? It seems to me that the term is substantially equivalent to the expression "modes of procedure;" and that the whole phrase, "proceedings in a special proceeding," means the forms by which the various steps in a special proceeding are conducted.

As applied, for example, to the subject of taxation of costs, the application for an allowance of costs in this

court is doubtless "a proceeding in a special pro-

[?] ceeding." If the repealed statutes prescribed any

forms or modes of procedure in the matter of applica-

tions for costs, these forms and modes must still pre-

vail, so far as relates to cases begun on or before the

[?] 31st of August, 1880. But the determination of the

question whether there exists any right to costs,

and if any are to be accorded, the ascertainment of

their amount—these are not, in any sense, matters of

procedure.

[?] And the provisions of the present Code declaring

under what circumstances costs may be allowed, and

what shall be the limits of each allowance, are not pro-

visions which regulate the proceedings to be taken in a

special proceeding.

[?] I hold, therefore, that ever since September 1,

1880, those provisions have been in full force, and

applicable to all cases, no matter when this court

acquired jurisdiction in the premises.

This view is in harmony with the decision of Judge DUEER in Rich *v.* Husson (1 *Duer*, 617).

In section 303 of our first Code of Procedure there was

a provision in the following words: "All statutes estab-

lishing or regulating the costs, or fees of attorneys, etc.,

are repealed." * * *

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Unless these words had been somehow restricted they would, of course, have operated to extinguish all claim to costs based upon laws in force before the Code became effective. Section 8 of that Code declares, that part 2 (and section 303 is therein included) "relates to civil actions commenced in the courts of this state after the first day of July, 1848, except when otherwise provided therein." * * * The significance of this provision was indisputable, though it was awkwardly worded. It meant that the Code provisions in question should apply not only to actions commenced after July 1, 1848, but, within certain limitations, to actions previously commenced. Certain of those limitations are set forth by section 459, as amended in 1851, in these words:

"The provisions of this act apply to future proceedings in actions or suits heretofore commenced, and now pending, as follows: (1) Where there has been no pleading, "to the pleadings and all subsequent proceedings." (2) Where there is an issue to be tried, "to the trial and all subsequent proceedings."

It was insisted in the case of Rich *v.* Husson, *supra*, that the entry of judgment and the taxation and adjustment of costs, involving, of course, the questions of the right to costs and the amount thereof, were "proceedings" in the cause, and that, as the Code provisions were applicable to such "proceedings," it was only by applying those provisions that the questions thereby involved could be determined.

The court held otherwise, however. Says Judge DUER: "The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is the law which gives a right to costs and fixes their amount. It is procedure which declares when and by whom the costs * * * shall be adjusted or taxed." * * *

This decision was at once accepted as a correct expo-

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sition of the law, has since been repeatedly cited, and always with approval, (Connoly's New York Citations, 748; Matter of Mace, 4 *Redf.* 325).

The costs in this matter must, therefore, be adjusted according to the provisions of the present Code.

HUGHES ET AL. *v.* HUGHES AND ANOTHER.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
JUNE, 1882.

§ 1533.

Action for partition.—For present partition and sale cannot be maintained by tenants in common of vested remainder to completely dispose of all interests, including a particular estate.—When sale cannot be had, even subject to interest of particular estate.—Section 1533 merely declaratory of the law as it previously existed.

An action for the present partition and sale of real property cannot, while a life tenant is still living, be maintained by tenants in common of a vested remainder so as to completely dispose of all interests, including the particular estate, without the assent of the owner of such particular estate.^[1] Nor can such plaintiffs in an action for partition have a sale of the property, even subject to the interests of the particular estate; certainly they cannot have such sale when it would be prejudicial to the rights of an infant defendant, a co-tenant, and to the rights of the owner of the particular estate and without his consent.^[2]

Section 1533 of the Code of Civil Procedure, in relation to an action for partition by joint tenants or tenants in common of a vested remainder or reversion, is merely declaratory of the law as it previously existed.^[3]*

* The intent of section 1533 is quite fully stated by Mr. Throop in the preliminary note to Article 2, Title 1 of Chapter 14 of his edition of the Code (1881); he says: * * * "A provision, section 1533, has been inserted, to settle a doubt which existed, as to the proper construction of the original statute, in regard to the right of a reversioner or remainderman to bring an action for partition. See Brownell *v.* Brownell, 19 *Wend.* 367; Burhans *v.* Burhans, 2 *Barb. Ch. R.* 398; Fleet *v.* Dorland, 11

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Motion for judgment.

This was an action for the partition of certain premises consisting of a house and lot, situate in the city of New York.

The complaint set forth the interests of the respective parties, and demanded that partition be made of the whole property; or, in case actual partition could not be made, that the entire property be sold, and the proceeds divided among the parties according to their respective interests.

The findings of fact, which were agreed upon by the parties, showed that in 1881, one Ellen Hughes, the owner in fee of the property in question, died intestate leaving a husband, the defendant James Hughes, and four children, of whom three were of full age, and plaintiffs in the action, and the fourth, an infant, was a defendant with his father. It was also found that, the defendant James Hughes was in possession as tenant by the courtesy, and that the plaintiffs and the infant defendant were seized of an estate in fee in the property, each being the owner of an undivided one-fourth, but subject to such tenancy by the courtesy; and there were

How. Pr. 489, on the one hand; and *McGlone v. Goodwin*, 8 *Daly*, 185, and *Blakely v. Calder*, 15 *N. Y.* 617, on the other. In the last case, four of the judges expressed the opinion that a tenant in common of a vested remainder, might maintain an action for partition, but the question not being necessarily involved in the case, the other members of the court refrained from deciding it. See, also, *Chism v. Keith*, 1 *Hun*, 589; *Howell v. Mills*, 7 *Lans.* 193; *Sullivan v. Sullivan*, 4 *Hun*, 198; S. C., 6 *N. Y. Sup. Ct. (T. & C.)* 433, and, on appeal, 66 *N. Y.* 87." * * *

"In this state of the authorities, the commissioners felt at liberty to propose such a solution of the question, as appeared, upon the whole, to be just. Cases often arise where it is essential to the interests of the owner of an undivided share in reversion, that his estate should be severed from that of his co-tenants, if it can be done by an actual partition, and such a partition can never result in any serious injury to the other owners; but where an actual partition cannot be had, a sale of the property, subject to the encumbrances of the precedent estate, can be productive of little or no benefit to any party, and may be highly prejud-

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further findings to the effect, that actual partition could not be made ; that the defendant James Hughes refused to accept a sum in gross in lieu of his life estate by the courtesy ; and that a partition could not be made without great prejudice to the rights of the owners.

In their answers the defendants had set up the possession of James Hughes as tenant by the courtesy as a bar to the action ; and there was an allegation by the infant, that a sale of the remainder would be prejudicial to his interests.

Samuel G. Courtney, for plaintiffs.

Simpson & Werner, for defendant James Hughes.

W. C. Davidson, for guardian *ad litem* of infant defendant.

DONOHUE, J.—In this case, the question is fairly presented, whether a remainderman can compel present partition and sale of real estate while the life tenant [1] is still living, without his assent. On principle, it would seem clear that the tenant for life of the

dicial to the interests of the other owners, and defeat, at least in part, the purpose of the person by whom the estate was created. When it is considered that, in most cases, infants are parties, that there are usually few bidders at a sale of property subject to a prior estate, and that those are persons who are apt to estimate the burden of the encumbrance at too high a rate; the danger of allowing a sale, for the purpose of dividing the proceeds, is apparent. The section referred to, therefore, allows the action, in such a case, to be maintained only where an actual partition can be had." * * *

Reading section 1583 in connection with Mr. Throop's note, it would seem that, where the action is brought by joint tenants or tenants in common of a vested remainder or reversion, the partition is subject to the interest of the person holding the particular estate; that the property must be susceptible of an actual partition, as a sale is not permitted; and, that even when an actual partition can be made, if it would be greatly prejudicial to the interests of the other owners, the complaint must be dismissed.

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whole could not be deprived of his present positive rights, and another *status*—that is, a gross sum—be substituted without his assent. But, without considering the question on principle, it seems to me the question has been fully disposed of by the court of last resort.

Blakeley *v.* Calder (15 N. Y., 617), has been cited and relied on by the plaintiff. In that case all parties, including the life-tenant, had united in the partition suit and the decree, and asked its enforcement; and the party objecting was the purchaser. Whether, as matter of principle, that should make a change is not necessary to discuss, because the court there held it did, and put its decision on such assent, and the result was merely to hold that the purchaser could not raise the question.

In Howell *v.* Mills (56 N. Y., 226), cited by plaintiff, the court puts its decision solely on the ground that no exception brought up the question, and there was nothing before it but the question of jurisdiction, and, as the supreme court had jurisdiction, the court of appeals had no means of ascertaining whether error had been committed in the decision. No exception brought up any erroneous ruling.

In Sullivan *v.* Sullivan (66 N. Y., 37), it seems to me the very question raised is disposed of. The court there say that, "We think it too well settled by authority, as well as upon principle, that a remainderman cannot, as against others not seized of a like estate in common with him, maintain the action to disturb the rule. If the action should be extended and the benefit given to other parties, it must be done by legislation."

[*] And this brings us to the question of whether legislation has changed the law on the subject. No suggestion is made anywhere that the amendment to the Code was intended to change the law. That radical

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change, if intended, would have been stated, and the intent made plain. The words of the section of the

Code seem to me to intend simply to codify what [§] the law was, and not to change it. The plaintiffs' counsel admits, in his brief, that the court should, on request, order the premises sold subject to the life estate, and subject to the life tenant's rights. Such a sale would be a gross injustice to the infant and those not consenting. No such sale could produce a fair and open competition for the lands, as no buyer would desire to purchase such an estate, and its effect would only be to declare the plaintiffs' rights, which are already admitted.

I do not feel disposed, without some clear law shows the intent to change, to hold that the rights of a life tenant can be thus interfered with, or be subjected to useless litigation; and must hold, until the higher courts change the rule, that the action will not lie.

In Morse *v.* Morse, while this exact case is not before the court, the following language is used (85 N. Y., 53, 57): "*Unless he took under the will a present estate in possession, in the premises in question, he cannot maintain this action.*" And for this the court cite Sullivan *v.* Sullivan, without disapproval, but as being the law. The case of Morse *v.* Morse does not, as stated, raise the exact point in this case, but the court affirm the doctrine that to entitle the remainderman to the remedy there must be a *present estate in possession*.*

* The precise claim of plaintiffs in Morse *v.* Morse (85 N. Y. 53, a case which arose under the R. S., although decided in 1881), was, as set forth at page 58 of that case, that they "took upon the testator's death, a present legal estate in the farm as tenants in common, subject to a bare power of sale vested in the executor," and that they might, therefore, maintain an action for partition.

While it may be conceded that joint tenants and tenants in common cannot maintain an action for partition unless they are in possession, actual or constructive (3 R. S. 317, § 1; *Code of Civ. Pro.* § 1532; Sulli-

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Here the estate in possession is with the tenant for life, and cannot be disturbed by one whose title to possession arises only on the death of the present possessor.

Judgment for defendants.

van v. Sullivan, 66 N. Y. 87, limiting and distinguishing *Blakeley v. Calder*, 15 N. Y. 617, affirming 13 *How.* 476, and also distinguishing *Howell v. Mills*, 56 N. Y. 226; *Morse v. Morse*, 85 N. Y. 53; *Florence v. Hopkins*, 46 N. Y. 182; *Van Schuyver v. Mulford*, 59 N. Y. 426, 430; *Howell v. Mills*, 7 *Lans.* 193; *Therasson v. White*, 52 *How.* 62; *Stewart v. Munroe*, 56 *How.* 193), so far as the last paragraph of the opinion in *Hughes v. Hughes, supra*, may admit of the broad construction that an action for partition cannot be maintained by joint tenants or tenants in common of a vested remainder or reversion, even among themselves, because such tenants are not in possession, it would seem to be open to question. Section 1533 does not require such plaintiffs to be in possession, and necessarily contemplates the existence of a precedent estate. That a remainderman has neither actual nor constructive possession, but simply an estate to vest in possession *in futuro*, was one of the grounds upon which the right to maintain an action of partition, at least as against others not seized of a like estate in common with him, was denied to the remainderman in *Sullivan v. Sullivan*, 66 N. Y. 87; and see the cases for and against the right of a remainderman to maintain an action for partition, cited in the extract from Mr. Throop's preliminary note to Article 2 of Title 1 of Chapter XIV, *ante*, p. 100. But whatever doubt may have previously existed, the Code now expressly permits an action for partition to be maintained by such plaintiffs. It does not, however, pretend to change the character of their estates; and, at least when the particular estate is of freehold, there is no possession or right of possession in the remainderman, even within the case of *Jenkins v. Fahey*, 73 N. Y. 355, 362-364.

The fair import of the opinion on this point would, however, seem to be, that the remainderman could not maintain the action as against the owners of the particular estate, because they were not seized of a like estate in common with him—his being a present estate in possession, and theirs being an estate to vest in possession *in futuro*—that the action should have been confined to the remainderman, and the owner of the particular estate should not have been made a party.

Nehrboss v. Bliss.

NEHRBOSS ET AL., APPELLANTS, v. BLISS AND
ANOTHER, RESPONDENTS.

COURT OF APPEALS; MARCH, 1882.

§§ 1464, 1466.

Redemption of real property sold under execution.—Redemption by surviving member of partnership, as a creditor by judgment.—Delivery of what papers, by such survivor, sufficient.—Not necessary for such survivor to deliver any assignment of the judgment to himself.—If surviving member dies, redemption could be made by his personal representative.—Upon the death of one of two members of a partnership, what vests in the survivor.

Upon the death of one of two members of a firm, the legal right, under the firm contracts or causes of action, and the sole right to collect the partnership debts, remain in the survivor, and are vested so effectually that, upon the death of the survivor, they devolve upon his personal representative, and he alone could sue thereon.^[*]

Where the surviving member of a partnership recovered judgment, as such survivor, and in proceedings to redeem, as a creditor by judgment, the real property of his judgment debtor sold under execution, delivered to the sheriff as evidence of his right to redeem and as a compliance with the requirements of section 1464 of the Code, a duly certified copy of the docket of his judgment, wherein the judgment was described as having been recovered by "Seth P. Bliss, as survivor of himself and Jerome Pierce, deceased," as plaintiff, and an affidavit attached to said docket, which set forth that, "Seth P. Bliss being duly sworn, says that he is the owner and holder of the judgment mentioned in the foregoing copy of the docket of judgment," and then proceeded to state the sum remaining unpaid upon the judgment at the time of claiming the right to redeem, but he did not deliver to the sheriff any assignment of such judgment to himself,—*Held*, that although the action was in the name of Bliss as survivor, it was his own, and that he had the legal title to the judgment as much as if the cause of action had stood in his own right, and, therefore, it was not necessary for him as redeeming creditor to present any assignment of the judgment to himself, or to add to the statement in the affidavit any words, showing his identity with the judgment creditor; that he was in law the owner of the judgment, and appeared to be so upon the face of the papers.^[*] ^[*]

It seems, that if Bliss had died after the recovery of his judgment and

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before redemption, his executor or administrator could have redeemed under section 1466 of the Code.^[1]

Proceedings for the redemption of real property sold under execution are statutory, and words cannot, for any purpose, be added to, or omitted from, the statute, and its language is to be construed strictly.^[1]

(Decided April 11, 1882.)

Appeal by plaintiffs from an order of the general term, fourth department, reversing a judgment in favor of the plaintiffs, entered upon the report of a referee, and granting a new trial.

This action was brought against Seth P. Bliss and the sheriff of Niagara county to set aside a deed of certain premises situate in the county of Niagara, made by the said sheriff to the said Bliss as a redeeming creditor by judgment, and to require such sheriff to convey the premises to the plaintiffs.

The facts of the case, so far as they are necessary to an understanding of the questions here decided, may be stated as follows: In December, 1873, Donald Bain and Michael Shaler recovered two judgments of \$500.88 each against John Batt and Xavier Batt; and on March 12, 1879, the sheriff of Niagara county, upon executions issued on these judgments, sold at public auction the premises in question to John Nehrboss (the original plaintiff in this action, since deceased, and for whom the present plaintiffs were substituted), for the sum of \$1,413.23, and executed and delivered to him a certificate of sale.

In May, 1879, the defendant Bliss, as survivor of himself and Jerome Pierce, deceased, recovered, in the supreme court, Erie county, a judgment for the sum of \$2,880.39, and a transcript of this judgment was filed and the judgment docketed in Niagara county on May 12, 1879. On May 12, 1880, the defendant Bliss applied to the sheriff of Niagara county to redeem the premises sold as aforesaid, and delivered to him a certificate of

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satisfaction of the judgment recovered by him, as survivor, in May, 1879, two duly certified copies of the docket of said judgment, one by the county clerk of Erie county, and the other by the county clerk of Niagara county, to each of which was attached an affidavit, verified on May 12, 1880, and in the following words: (Venue.) "Seth P. Bliss being duly sworn, says that he is the owner and holder of the judgment mentioned in the foregoing copy of docket of judgment, and that there is due and remaining unpaid on said judgment the sum of \$3,087.05, this 12th day of June, 1880." (Signature and jurat.) In the copies of the docket, the title of the action was given as "Seth P. Bliss, as survivor of himself and Jerome Pierce, deceased, against John Batt and Xavier Batt," and the certificate of satisfaction was likewise entitled. And at the time of delivering these papers, the defendant Bliss also paid to the sheriff the sum of \$1,537, that being, in round numbers, the amount for which the premises were sold, with interest thereon for thirteen months at the rate of seven per centum a year (see §§ 1449, 1450). The sheriff thereupon executed and delivered to Bliss a certificate of redemption, and no other redeeming creditor having appeared within twenty-four hours (§ 1454), the premises were duly conveyed to Bliss.

John Nehrboss, who, besides being the purchaser at the execution sale, was also a judgment creditor of the said John Batt and Xavier Batt, refused to accept the redemption, and claimed that the premises should have been conveyed to him as the sale to Bliss was void for the reasons that the affidavit delivered by Bliss did not comply with the requirements of the statute, in that it failed to state in what manner, whether by assignment or otherwise, Bliss became the owner of the judgment; that he did not deliver any assignment establishing his right to redeem, nor, in any manner, show that he was

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the owner of the judgment as required by section 1464 of the Code; that the certificate of satisfaction delivered did not, and could not, discharge the judgment in favor of Bliss, as survivor, and that no legal redemption was, therefore, made.

Joseph V. Seaver, for appellants:

The statute in relation to redemptions must be strictly construed, and all its requirements observed; *Bank of Vargennes v. Warren*, 7 *Hill*, 91; *People ex rel. v. Sheriff, 19 Wend.* 87; *Ex Parte Bank of Monroe*, 7 *Hill*, 177; *Ex Parte Newell*, 4 *Id.* 608; *People ex rel. v. Covell, 18 Wend.* 598; *Merritt v. Jackson*, 1 *Id.* 46; *Waller v. Harris*, 7 *Paige*, 167; *Ex Parte Aldrich*, 1 *Denio*, 662; *Ex Parte Raymond*, *Id.* 272; *Ex Parte Shumway*, 4 *Id.* 258; *Ex Parte The Peru Iron Co.*, 7 *Cow.* 540; *Dickenson v. Gilliland*, 1 *Id.* 481; *Hall v. Thomas*, 27 *Barb.* 55; *Phillips v. Schiffer*, 64 *Id.* 548; *People ex rel. v. Rawson*, 2 *N. Y.* 490; *Wood v. Morehouse*, 45 *Id.* 368; *Smith v. Miller*, 25 *Id.* 619; *Gilchrist v. Comfort*, 34 *Id.* 235; *People ex rel. v. Becker*, 20 *Id.* 354; 3 *Wait's Pr.* 94, 95; 4 *Id.* 105.

The copy of the docket shows that the judgment was in favor of Bliss, as the survivor of himself and Jerome Pierce, deceased. Bliss could not be the owner of the judgment, unless he became so by assignment. If he were, in fact, the owner of the cause of action, he could not have maintained the action as survivor. The affidavit does not state how he became the owner of the judgment, whether by assignment or otherwise, and no assignment from Bliss as survivor to Bliss individually was delivered. Without an assignment there was nothing to show that he was the owner of the judgment, and no legal redemption could have been made. Bliss was only entitled to the assets of the firm of

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Bliss & Pierce for the purpose of settling the affairs of the partnership. Case *v.* Abeel, 1 *Paige*, 393.

R. L. Burrows (Geo. Wing, attorney), for respondents:

Where, in a firm consisting of two members, one of them dies, the rights of action which were vested in the firm survive to the remaining member, not as an administrator or executor, representing another person, but as the survivor of the partnership, representing the partnership and being all that is left of the firm. Adams *v.* Hacket, 27 *N. H.* 289, citing Slipper *v.* Stidstone, 5 *D. & E.* 493; French *v.* Andrade, 6 *Id.* 582; Smith *v.* Barrow, 2 *Id.* 476; Golding *v.* Vaughn, 2 *Chitty*, 436; Richards *v.* Howther, 1 *Barn. & Ald.* 29. In such a case, the surviving partner is entitled to all the choses in action and other evidences of debt belonging to the firm, and they must be collected in his name and he is entitled to the exclusive custody and control thereof. Murray *v.* Mumford, 6 *Cow.* 441; Daby *v.* Ericsson, 45 *N. Y.* 786. In Murray *v.* Mumford, *supra*, the action was brought in the name of the survivor without describing him in the title of the action "as survivor." The conclusion to be drawn from these cases is, that Seth P. Bliss, named in the docket of judgment, was the judgment creditor of the judgment under which he redeemed, and that the action could have been maintained in the name of Bliss as well as in the name of Bliss "as survivor."

The language of the affidavit delivered to the sheriff was equivalent to an asseveration, that Bliss had not assigned the judgment, and was still the owner thereof, and, being verified by Seth P. Bliss, and the name of the judgment creditor being Seth P. Bliss, the identity of the names was *prima facie* evidence that the Bliss redeeming was the Bliss mentioned in the docket of judgment. Hatcher *v.* Rocheleau, 18 *N. Y.* 86; People

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ex rel. *v.* Smith, 45 N. Y. 772; Daby *v.* Ericsson, 45 N. Y. 786.

The affidavit was sufficient within the authority of *Ex Parte* Newell, 4 Hill, 608; People *ex rel.* *v.* Ransom, 2 Id. 51; People *ex rel.* *v.* Fleming, 2 N. Y. 484; People *ex rel.* *v.* Beebe, 1 Barb. 379; Muir *v.* Leitch, 7 Id. 341; Aylesworth *v.* Brown, 10 Id. 167, and Ellsworth *v.* Muldoon, 46 How. 246.

The statute should be liberally construed. Van Rensselaer *v.* The Sheriff, 1 Cow. 510; People *ex rel.* *v.* Ransom, 2 Hill, 51; *Ex Parte* Newell, 4 Id. 608; People *ex rel.* *v.* Fleming, 4 Denio, 137; Aylesworth *v.* Brown, 10 Barb. 167; Ellsworth *v.* Muldoon, 46 How. 246.

DANFORTH, J. — The appellants concede that the only question raised upon the trial was as to the effect of the papers filed for the purpose of redemption. And the precise objection, as indicated by the points submitted by the learned counsel in support of this appeal, is that Seth P. Bliss is described therein as the redeeming party, without words indicating that he is the survivor of himself and Pierce, as he is named in the judgment record under which he sought to redeem.

[1] The proceedings are statutory, and it is to be conceded, that words cannot be added to, or omitted from, the statute, for any purpose; but, on the contrary, its language is to be construed strictly. The defendant claimed the right to redeem under section 1464 of the Code of Civil Procedure. He was, therefore, required to file in the county clerk's office, or deliver to the sheriff, as evidence of his right, (1.) a copy of the docket of the judgment under which he claims the right to redeem; (2.) if that right depended upon any assignment of the judgment, it must also be filed, etc.; and (3.) an affidavit, made by him, stating truly the sum unpaid upon the judgment.

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The copy of docket furnished by the respondent, described a judgment in which "Seth P. Bliss, as survivor of himself and Jerome Pierce, deceased," is plaintiff. It was accompanied by no assignment or other paper, save an affidavit attached thereto, which, so far as material to our present inquiry, is in these words: "Seth P. Bliss being duly sworn, says that he is the owner and holder of the judgment mentioned in the foregoing copy of docket of judgment, and that there is [²] due," etc. Upon the death of Pierce, the legal right, under the firm contracts or causes of action, and the sole right to collect the partnership debts remained in the survivor (*Viner's Abr., Partners* [D], *Lindley on Partnership*, vol. 1, p. 505; *Voorhis v. Childs*, 17 N.Y. 354), and vested so effectually that, upon his death, it would have devolved upon his personal representative, and he alone could sue upon it (1 *Williams on Exrs.*, 850; *Copes v. Fultz*, 1 *Sm. & Mar.* 623). So, if Bliss died after judgment, redemption could have been had under section 1466, by the executor or administrator of Bliss.

The right to the cause of action, and to sue therefor, came to Bliss by survivorship, and that is indicated in the title of the judgment. But so completely was it vested, that a demand against him in his own right might have been set off in diminution of his claim as surviving partner (*Slipper v. Stidstone*, 5 *Term R.* 493, and conversely, *French v. Andrade*, 6 *Term R.* 582). It follows, therefore, that as surviving partner, he might join in one action a count for a debt due him in his own right and one due him as survivor (*Adams v. Hackett*, 27 *N.H.* 269), or a plaintiff in an action, charging him in his own right, might recover a demand due from him individually, and another due from him as surviving partner (*Richards v. Heather*, 1 *B. & Ald.* 29).

[⁴] Therefore, although the action was in his name as

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survivor, it was his own, and he had the legal title to the judgment, as much so as if the cause of action had stood in his own right (*Kemp v. Andrews*, 1 *Showers*, p. 188, *Case*, 138; *Murray v. Mumford*, 6 *Cowen*, 441; *Daby v. Ericsson*, 45 N. Y. 786).

[5] It, therefore, was not necessary for him, as redeeming creditor, to present any assignment of the judgment to himself, or add to the statement in the affidavit any other words showing his identity with the judgment creditor. He was in law the owner of the judgment, and appeared to be so on the face of the papers.

No other point needs consideration.

The redemption, for aught that now appears, was made according to the letter of the statute, and the order appealed from should be affirmed with costs, and judgment absolute redered in favor of the defendants and against the plaintiffs, pursuant to their stipulation.

All concurred, except TRACY, J., who did not vote.

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DUCHE ET AL. v. THE BUFFALO GRAPE SUGAR COMPANY.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
SEPTEMBER, 1882.

§§ 781, 783, 984-986.

Change of venue.—Right of domestic corporation, when sued by a non-resident, to have trial take place in county of its principal place of business.—Such right not jurisdictional, and may be waived.—Within what time motion must be made to change the place of trial, when the county designated is not the proper one.—Upon such a motion, convenience of witnesses not considered.—It seems, a defendant cannot be relieved from a compliance with § 986 by a resort to §§ 781, 783.

Where a domestic corporation is sued by a non-resident, and the action is one not specified in sections 982 and 983 of the Code of Civil Procedure, such corporation has the right to have the trial take place in the county which is designated in its certificate of incorporation as that in which its principal office for the transaction of business is located. But such right is not absolute, and is in no sense jurisdictional, and may, therefore, be waived; and in order to secure the enjoyment of such right, when the proper county is not designated by the plaintiff, the requirements of section 986 of the Code must be observed.^[1] ^[2]

Under section 126 of the Code of Procedure there was no limitation of the time in which a motion to change the place of trial to the proper county could be made; ^[1] but section 986 of the Code of Civil Procedure has altered the law in this respect, and requires, when the plaintiff does not consent to the change as proposed by the defendant in his demand, the service of a notice of motion to compel the change, within ten days after the expiration of the five days within which the plaintiff is allowed to consent.^[1]

The purpose of the alteration effected by section 986 of the Code of Civil Procedure, stated.^[1]

It seems, that sections 781 and 783 of the Code of Civil Procedure, enlarging time, could not be resorted to in order to relieve the defendant from a compliance with the requirements of section 986; at least, when no

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cause is shown for an extension of time, and there is no application for such relief. ["] *

Upon a motion to change the place of trial on the ground that the county designated by the plaintiff is not the proper county, no regard can be had to the convenience of witnesses; the convenience of witnesses and the promotion of the ends of justice are grounds for a separate motion. ["] †

Motion by defendant to change the place of trial.

The plaintiffs were residents of London, England, and the defendant was a domestic corporation organized under chapter 40 of the Laws of 1848, having its prin-

* In *Clark v. Campbell* (54 *Hou.* 166), where more than two months had elapsed after the service of the demand, and the cause had been noticed for trial in the county of New York, and the motion to compel the change to the proper county was made on the grounds that the transactions had taken place in the county of Washington, and that the plaintiff and two (if not all three) of the defendants resided in that county, it was held (LAWRENCE, J.), that, even if under section 986 of the Code, the defendants could not, as a matter of right, then claim that the cause should be sent to Washington county for trial, the court had the power under section 987, to change the place of trial to the proper county, and that the transactions having arisen in Washington county, and the parties being residents of that county, it was a proper exercise of the power of the court to change the place of trial.

But the limit of the time within which the defendant must make his motion to compel the change, according to the terms of section 986, was not, as might be inferred from the syllabus, defined in that case.

A motion to change the venue on the ground that the county designated by the plaintiff, is not the proper one, cannot be entertained until after a demand has been made according to section 986, and such demand cannot be made until after an appearance in the action. *Van Dyck v. McQuade*, 18 *Hun*, 376.

For some recent cases in relation to changing the place of trial, on the ground that the county designated by the plaintiff is not the proper one, within section 984, see *Fletcher v. Marshall*, 59 *Hou.* 373; *Cowen v. Quinn*, 18 *Hun*, 844; *Gifford v. Town of Gravesend*, 8 *Abb. N. C.* 246; *Veeder v. Baker*, 83 *N. Y.* 156; *Knickerbocker Life Ins. Co. v. Clark*, 22 *Hun*, 506.

† To the same effect, see *Veeder v. Baker*, 83 *N. Y.* 156, 161; *Gifford v. Town of Gravesend*, 8 *Abb. N. C.* 246, and cases cited; and under the Code of Procedure, International Life, etc., Co. v. Sweetland, 14 *Abb.* 240.

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pal place of business, by the terms of its certificate of incorporation, in the city of Buffalo.

The action was brought to recover damages for an alleged breach of warranty in the quality of goods, for money paid, laid out and expended, and for commissions earned.

The county designated as the place of trial, both in the summons and complaint, was the county of New York. The defendant's demand that the place of trial be changed to Erie county, was served with its answer, on July 12, 1882. The plaintiffs did not accede thereto, and the papers on this motion were served August 14, 1882. The motion was made solely upon the ground that the county designated in the complaint, as the place of trial, was not the proper county ; and there was nothing in the moving papers explanatory of the defendant's delay, nor in relation to the convenience of witnesses.

F. J. Filhian (Bowen, Rogers & Locke, attorneys),
for motion.

Mitchell & Mitchell, opposed.

POTTER, J.—The motion is made upon the ground that the place of trial in this action is governed by section 984 Code of Civil Procedure. The action doubtless belongs to the class of actions provided for by that section. The plaintiff is a non-resident, and the defendant is a domestic corporation organized under the act of 1848. By the terms of the certificates of the defendant, filed in the office of the clerk of Erie county, and in the office of the secretary of state, the city of Buffalo and the county of Erie were designated as the places where its principal office of business was to be located, and its operations were to be carried on. The defendant, ['] therefore, had the right to have the trial take place in Erie county. But such right is not an absolute

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right, and is in no sense jurisdictional, and hence may be waived. (Section 985.)

[2] To secure the enjoyment of such right, and to prevent a waiver of it, section 986 provides, that the defendant must demand to have the trial take place in the county of his residence, and if the plaintiff does not serve a written consent to the change required, within five days after service of such demand, the defendant may serve a notice of motion to the court to compel the change. The demand in this case was served upon the 12th of July. The plaintiff neglected or refused to consent to the change, and upon the 14th day of August the defendant served notice of this motion. I think the motion was out of time, and must for that reason be denied. The statute is clearly permissive of the motion, provided the motion is made in a certain manner, and within a prescribed time.

[3] Under the former Code (section 126) there was no limitation of the time in which the motion to change the place of trial to the proper county could be made, and, accordingly, it was held under that statute, that such a motion could be made at any time before trial, (*Hubbard v. Nat. Protection Ins. Co.*, 11 *How.* 149; *Conroe v. Nat. Protection Ins. Co.*, 10 *How.* 403).

[4] But a change was made by section 986 of the Code of Civil Procedure, requiring the service of notice of motion to compel the change to be made within ten days after the expiration of the five days. I

[5] think it plain that the legislature intended to change the law in this respect. One purpose doubtless was, while affording the defendant a reasonable opportunity to have the trial in the county of his residence, yet he is required to make his election seasonably, so that it should be known and settled in what county the trial was to take place, that it might be placed upon the calendar of the county where it was to be tried, and to pre-

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vent dilatory efforts and motions to change the place of trial from an earlier calendar in one county to a later calendar in another.

[¶] It was urged upon the argument of the motion, that sections 781-783, enlarging time, etc., might be resorted to to relieve the defendant. From the view I take of the section in question, I do not think those sections can be made available for that purpose. But if those sections could be applied to this question, they could not be applied in the absence of any reason, or excuse, or explanation of the defendant's delay in making the motion. Section 781 provides for enlarging the time upon showing *grounds* therefor, and *before* the time to do an act has expired. Section 783 provides that *after* the time has elapsed in which an act is to be done, the court may grant relief upon *good cause* shown.

This is not an application for leave to make a motion for relief; and, if it were, the affidavits show no grounds or good cause for granting the relief desired. Of [¶] course, upon a motion to change the place of trial to the proper county, no regard can be had to the convenience of witnesses. If the defendant thinks the convenience of witnesses would be subserved, and the ends of justice promoted by a trial in Erie county, he is at liberty to make a motion to change the place of trial upon those grounds. Motion denied, with ten dollars costs.

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SUPREME COURT, THIRD DEPARTMENT, ULSTER COUNTY
SPECIAL TERM; JUNE, 1882.

§§ 1317, 1332.

Undertaking on appeal to the court of appeals.—On appeal from judgment of affirmance, to stay execution, must expressly provide for payment of the original judgment.—On appeal from judgment or order rendering the judgment appealed from, such undertaking, it seems, should provide for payment of the judgment of the general term.

Where an appeal is taken to the court of appeals from a judgment of the general term, affirming the judgment rendered below, section 1332 of the Code of Civil Procedure requires, that the undertaking given to stay the execution of the judgment of affirmance shall expressly provide for the payment of the *original judgment*, in case of the affirmance by the court of appeals of the judgment of the general term, or of the dismissal of the appeal.^[1]

Section 1317, which should be read in connection with section 1332, provides, that a judgment of the general term, affirming wholly or partly a judgment from which an appeal has been taken, shall not, expressly and in terms, award to the respondent a sum of money or other relief, which was awarded by the judgment affirmed; and as the object of this provision was to prevent the entry of double judgments, and as the general term do not, on such affirmance, make a new or original judgment to the same effect as the one which it affirms, it becomes necessary, on appeal to the court of appeals, in order to secure the payment of the original judgment, that the undertaking should conform to the requirements of section 1332, and be the same, as if the judgment from which the appeal is so taken, was of the same effect, as the judgment so affirmed.^[1]

It seems, that when the judgment or order of the general term does itself render or make an original judgment or order, the undertaking, on appeal to the court of appeals, should then provide for payment of the judgment of the general term.^[1]

* We have recently been informed that the order on this motion was reversed by the general term, third department, September, 1882. Memorandum by LEARNED, P. J.

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Motion by defendant to declare an undertaking, on appeal to the court of appeals, defective.

The issues in this action having been referred to a referee, he reported in favor of the defendants, and an order was obtained by the latter granting them an extra allowance, and a judgment for costs and allowances was entered against the plaintiff. On appeal to the general term, the judgment, and, also, the order granting the extra allowance, which was brought up for review with the judgment, were affirmed, and a judgment of affirmance and for \$192.11 costs of appeal, was entered November 30th, 1881. Plaintiff thereupon appealed to the court of appeals, from the judgment of affirmance of the general term, and gave the undertaking in question.

This undertaking contained the following recitals : "Whereas on the 30th day of November, 1881, in the supreme court, the above named respondent recovered a judgment against the above named appellant, for \$192.11, on appeal from the judgment and order granting an extra allowance for costs," etc. ; and, "the above named appellant intends to appeal therefrom to the court of appeals;" and then continued with the statement, that the sureties "undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding \$500; and do also undertake that, if the said judgment so appealed from, or any part thereof, be affirmed, or the said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on said appeal."

The other facts are sufficiently stated in the opinion.

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A. Schoonmaker, for the motion.

Wm. Lounsbury, opposed.

WESTBROOK, J.—This cause was before the court upon a similar motion in April last, and the opinion then written is contained in 63 *Howard*, 84 [*sub nom. Moses v. Hasbrouck.*] Upon that occasion, the undertaking given upon an appeal to the court of appeals from an order and judgment of the general term of this court, affirming a previous judgment for costs against the appellant in favor of the respondents, entered upon the report of a referee, was held to be defective for two reasons, to wit: First. Because it was executed by only two persons, of whom the appellant was one, and, therefore, it had not "two sureties," as required by the Code; and, Second. The form of the undertaking was adjudged not to be in accordance with section 1332 of the Code, which was held to require it to "be in the same form, as if the judgment appealed from did itself render a judgment similar to the one which it affirmed." In other words, it was then decided, that the undertaking should be in such a form that its express language would, in case of the affirmance by the court of appeals of the order or judgment of the general term, or of the dismissal of the appeal to the court of appeals, make the sureties thereon liable for the payment of the judgment entered upon the report of the referee, and which judgment the general term had affirmed.

The appellant has, since the previous decision, filed a new undertaking, which complies with such decision and the Code as to the number of the sureties, but its form is identical with that which was then held to be defective. By an analysis of the language of the previous undertaking, it was shown (63 *Howard*, 84, *see pages* 88, 89), that the sureties had simply made themselves liable for the payment of the judgment entered

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upon the decision of the general term, and not for the original judgment entered upon the report of the referee, which that of the general term had affirmed. It will be unnecessary to refer in detail to the language of the new undertaking, for as it is substantially identical, as has already been stated, with the former, the criticism of such former undertaking is applicable to it.

The respondents now move to have the last undertaking also declared defective, for the reason, that it does not comply with section 1332 of the Code by expressly providing for the payment of the original judgment. Upon this motion, the counsel for the appellant was, at his urgent request, again heard at some length, but nothing which he urged has, in the least, shaken the views expressed in the former opinion.

First. Section 1332 of the Code prescribes the form of the undertaking to be given, when the appeal to the court of appeals is from a judgment or order of the general term affirming a previous judgment or order. By sections 1327, 1328, 1229, 1330 and 1331, the forms of undertakings on appeals to the court of appeals from judgments or orders of the general term, directing the performance of some act, are prescribed, but in neither of those sections is the form of the undertaking given for a case in which the appeal is from a judgment or order of the general term affirming a previous judgment or order. For the latter case, section 1332 alone provides. What does it declare? "Where the judgment or order, from which an appeal is taken to the court of appeals, affirms a judgment or order, to the effect specified in either of the last five sections, the undertaking must be the same, as if the judgment or order, from which the appeal is so taken, was to the same effect, as the judgment or order so affirmed."

It would seem to be difficult to make a provision more explicit. "The undertaking must be the same," declares

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the statute, "as if the judgment or order, from which the appeal is so taken, was to the same effect, as [] the judgment or order so affirmed." If the judgment or order appealed from had itself rendered or made the original judgment or order, then, clearly, the undertaking to be given on appeal to the court of appeals, must provide for the payment of such judgment; but as the judgment or order of the general term did not render the original judgment, but simply affirmed it with costs, the undertaking to be given on the appeal to the court of appeals must, in order to "be the same as if the judgment or order, from which the appeal is so taken, was to the same effect, as the judgment or order affirmed," expressly provide for the payment of such original judgment. This seems so clear as to require no extended comment; but there is one further thought to which allusion will now be made.

By section 1317 of the Code the judgment or order of affirmance in the general term could not directly award the amount of the original judgment. Its language is, "a judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed." Of this provision Mr. Throop in his note says: "The second sentence of this section" (the one just quoted), "is new. It was added to prohibit, by an express enactment, the absurd, inconvenient, and unnecessary practice of entering up a judgment for the original amount, when a judgment appealed from is affirmed."

[] By the light of this section, the language of section 1332 is more easily understood. The judgment or order of the general term, when it affirms one previously rendered or made, must be simply an affirmance, and it cannot, "expressly and in terms," render or

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make a new one to the same effect as the old. As, therefore, the judgment or order of affirmance does not, "expressly and in terms," render or make a new judgment or order to the same effect as the one which it affirmed, it becomes necessary, on appeal to the court of appeals, in order to secure the payment of the original judgment, that "the undertaking must be the same, as if the judgment or order, from which the appeal is so taken, was of the same effect, as the judgment or order so affirmed."

Second. Mr. Throop, in his note to section 1332, has left us in no doubt as to his meaning by the insertion of such new section. He says: "The rule has been very obscure, upon the point which this section aims to settle; but it is believed that this section is in accordance with the practical construction of the provisions of the original statute. See Hinckley *v.* Kreitz (58 N. Y., 583), where it was held that the sureties in the undertaking, given upon appeal to the court of appeals, stand in the relation of sureties to those in the undertaking, given on appeal to the general term. This obscurity was, doubtless, one reason why double judgments were entered, as stated in the note to section 1317, *ante*."

This is a plain and explicit declaration by the author of the section, that it was inserted to remove all obscurity as to the liability of the sureties upon the appeal to the court of appeals. That court had held, in the case to which he refers, that those sureties occupied to the signers of the undertaking, on the appeal to the general term, the position of sureties. Still, as without the provisions of the new section, there might be some doubt as to the extent of the liability by them assumed, he has therein and thereby enacted, that the undertaking shall, in express words, provide for the payment of the original judgment, if the judgment of the general term, affirming such judgment, be itself affirmed by the judge

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ment or order of the court of last resort. Section 1332 does not, as the counsel for the appellant argued, declare the effect of the undertaking to be given, but to remove all doubt as to such effect, it prescribes the form of the instrument.

Having reached the conclusion that the undertaking of the appellant is defective, the remaining question is, shall his counsel have the opportunity to review the order, which this opinion indicates must be made? On the question involved in the motion, the judge who has heard it, entertains no doubt. He knows, however, the fallibility of human judgment, and the importance of having all doubt solved upon a point of practice of continual occurrence. As the judgment entered is doubtless secured by actual levy upon personal property, and is, also, a lien upon real estate, upon stipulating that such levy shall continue, and that no effort will, during the pending of the appeal from the order now to be made, be used to remove such lien from the real estate, an opportunity to review will be given, by staying its operation until the next general term of this court to be held in the third department; and, if the appeal to be taken is then heard, then a further stay is granted until the decision of the general term upon such appeal.

As no costs were either asked or given upon the previous motion, the present one, which presents only one of the points previously decided, must be granted, with \$10 costs.

McIntyre v. Strong.

McINTYRE, RESPONDENT, *v.* STRONG, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM; MAY, 1882.

§§ 1306, 1326.

Deposit in lieu of undertaking on appeal to general term.—Cannot be changed or withdrawn, after affirmance and pending appeal to court of appeals.—

*Amount deposited in lieu of undertaking on appeal to general term, cannot be substituted for undertaking or deposit, on appeal, to court of appeals.—*Quare*, whether when the general term materially reduces amount of judgment recovered below, any part of deposit can be withdrawn, on appeal to the court of appeals.*

The general rule is, that a voluntary deposit, in lieu of an undertaking, made to stay execution pending an appeal to the general term, can no more be changed or withdrawn than could an undertaking in the place of which the deposit stands. Such an undertaking could not be changed or withdrawn after affirmance of the judgment by the general term, because of an appeal having been perfected to the court of appeals by the execution of an undertaking for that purpose.

To perfect an appeal to the court of appeals, a new undertaking must be given or a new deposit made, and the court has no power to order that a sum of money already deposited in lieu of an undertaking on appeal to the general term, shall take the place of the undertaking or deposit required by sections 1306 and 1326, on appeal to the court of appeals.

Where, on appeal to the general term, the amount of a judgment was materially reduced by that court, and the reduction was, by stipulation, accepted by the respondent, and the amount deposited by the appellant to stay execution on appeal to the general term exceeded the amount of the judgment, as reduced, by \$1,150.76, and the appellant sought to withdraw \$650 of such excess, and to have the remainder (\$500.76), together with the amount of the judgment as reduced, stand as a deposit to perfect an appeal to the court of appeals; *Quare*, whether the court had the power to allow any part of the deposit to be withdrawn. But even if the court has such power, it should be exercised only when it clearly appears that the sum proposed to be left on deposit would, in view of all possible contingencies, be fully sufficient to satisfy the amount of any claim which the respondent might eventually have against it, in event of affirmance by the court of appeals, including interest upon the judgment, and the sum of \$500 for costs in that court.

(Decided June 5, 1882.)

McIntyre *v.* Strong.

Appeal by defendant from an order of the special term denying a motion that a part of the amount deposited by him, in lieu of an undertaking on appeal to the general term, be withdrawn, and that the remainder stand in lieu of an undertaking on appeal to the court of appeals.

A judgment for \$1,545.89 having been recovered by the plaintiff, the defendant appealed to the general term; and, for the purpose of staying execution pending such appeal, deposited with the clerk the sum of \$2,300. The general term reversed the judgment, unless the plaintiff should stipulate to reduce the amount thereof to the sum of \$1,149.24. Plaintiff made the required stipulation, and thereupon the judgment was affirmed for the reduced amount. The defendant desiring to appeal to the court of appeals, moved that the clerk be directed to pay over to him, out of the money deposited as aforesaid, the sum of \$650, and that the remainder, \$1,650, be allowed to stand on deposit in lieu of an undertaking, pending appeal to the court of appeals. At special term, the motion was denied "on the ground that the Code gives no authority to the court to grant said motion."

Adolphus D. Pape, for appellant.

Wm. J. Gibson, for respondent :

The deposit made in lieu of an undertaking on appeal from the judgment rendered at trial term, can no more be changed or withdrawn than could the undertaking (*Code Civ. Pro.* §§ 1352, 1326, 1306; *Parsons v. Travis, 2 Duer, 659; S. C. 5 Id. 650*). The appellant on appeal to court of appeals, must give an undertaking (§ 1326), or make a deposit in lieu thereof (§ 1306). The court cannot order that the deposit already made shall take the place of such undertaking or deposit.

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By the Court.—FREEDMAN, J.—The general rule undoubtedly is, that a voluntary deposit, like the one in question, made to perfect an appeal from the judgment of the special term to the general term, so as to stay execution thereon, is in lieu of an undertaking required to be executed by at least two sureties; that it can no more be changed or withdrawn than could the undertaking which it stands in place of; and that such an undertaking, when given, cannot be changed or withdrawn after the affirmance of the judgment by the general term, because an appeal has been perfected to the court of appeals by the execution of an undertaking required for that purpose. In every case falling within this rule, the appellant, to perfect the appeal to the court of appeals, must give a new undertaking (*Code*, § 1326), or make a new deposit of money in lieu thereof (§ 1306); and the court has no power to order that a sum of money already deposited in lieu of an undertaking on the appeal to the general term, shall take the place of the undertaking, or deposit required on an appeal to the court of appeals (*Parsons v. Travis*, 2 *Duer*, 659; S. C. 5 *Duer*, 650).

It has been argued, however, with great force and plausibility, that the rule applies only when the original judgment has been affirmed in full by the general term, and that whenever it appears that the judgment procured by a plaintiff has been, in pursuance of the decision of the general term, materially reduced in amount, and that the reduction has been accepted by the plaintiff by stipulation, a different and exceptional case is presented, in which the court has power to grant relief *pro tanto* under section 1306.

Without stopping to determine the validity of this claim, for the language of section 1306 is by no means clear upon the point, and no other provision has been pointed out, it is sufficient for present purposes to say,

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that the power, if it exists at all, should be exercised only when it clearly appears, that the sum proposed to be left on deposit is, in view of all possible contingencies, fully sufficient to satisfy any claim the plaintiff may eventually have to enforce against it, in case the judgment of the court of appeals should be one of affirmance, inclusive of interest, and the additional sum of \$500 for costs in that court. For under section 1211 the judgment appealed from bears interest from the time of its entry, and under section 1326 it is necessary, in order to render the notice of appeal to the court of appeals effectual for any purpose, that the appellant should give a written undertaking to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding \$500.

In the case at bar, if the motion has been granted, less than one dollar would have remained to cover accruing interest; nor were any facts presented upon which the amount of such interest could have been determined with reasonable certainty.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

SEDGWICK, Ch. J., concurred.

Bostwick v. Fifield.

BOSTWICK v. FIFIELD.

N. Y. COMMON PLEAS, SPECIAL TERM; MAY, 1882.

§§ 3268, 3343.

Security for costs.—In common pleas, cannot be required because plaintiff resides without the county of New York.—Court of common pleas is a “superior city court,” and not the county court referred to in § 3268.

The court of common pleas for the city and county of New York belongs to the class denominated “superior city courts;” and, although it is a county court for certain purposes, it is not the county court referred to in section 3268 of the Code.

Where the plaintiff in an action brought in the court of common pleas for the city and county of New York, resides within the state, but without the county of New York, he cannot be required to give security for costs under subd. 1 of section 3268 of the Code.*

Motion by defendant to require the plaintiff to file security for costs.

The motion was made upon the assumption, that the court of common pleas was a county court; and the plaintiff being, in fact, a resident of Brooklyn, Kings county, the defendant was, therefore, entitled to security for costs, under subd. 1 of section 3268.

Wm. H. Tilton, for motion.

H. B. Whitbeck, opposed.

DALY, Ch. J.—This motion is to compel the plaintiff, who resides in Brooklyn, to file security for costs, under section 3268 of the Code. It must be denied.

*Nor, in the superior court of the city of New York under the Code of Civil Procedure, can a plaintiff who resides within the state, but without the city of New York, be required to give security for costs under subd. 1 of section 3268. *Lewis v. Farrell*, 46 N. Y. Super. (14 J. & S.), 858; and see also *Wiley v. Arnoux*, *Id.* 575; S. C., 60 How. 187.

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The county court referred to in that section does not mean this court, which belongs, under the Code, to the class denominated "Superior City Courts," section 3343, subd. 1; and the county court meant in section 3268 is, in the language of the Code, the "county court in each county, except New York," section 2, subds. 6 and 13.

This court is a county court for certain purposes, but is not the county court referred to in section 3268.

PLIMPTON AND ANO. v. BIGELOW.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
OCTOBER, 1882.

§§ 644, 647, 648.

Attachment of property.—Shares in corporation cannot be attached, unless within the county or jurisdiction of the court.—Levy upon shares in foreign corporation, when such shares not within state, must be discharged.—When absence of certificate by secretary of state to an affidavit verified before a commissioner of the state, will be waived.

The rights or shares of a defendant in the stock of a corporation or association, which may be levied upon under a warrant of attachment according to the provisions of section 647 of the Code, are such rights or shares as are within the county or jurisdiction of the court.^[?]

Where a non-resident defendant was the owner of certain shares of the capital stock of a foreign corporation, none of which shares had, at any time, been within the state, and the principal office and factory of such corporation were without the state, but it kept an office, conducted by its secretary, in the city of New York for the sale of goods manufactured by it, and the sheriff on a warrant of attachment against the property of the defendant executed the same in the manner required by subdivision 3 of section 649 of the Code, and received from the secretary of such corporation a certificate of the defendant's interest,—*Held*, on motion by defendant to vacate the levy under the warrant, that as the certif-

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cate of stock issued by the corporation to the defendant was not, and had never been, within the state, and the corporation being a foreign one and not within the state, and being subject to the laws of another state, and to the judgments and decrees of foreign courts, the sheriff had not made a valid levy upon the defendant's shares in such corporation. [] []

The objection, that affidavits verified before a commissioner of the state have not the certificate of the secretary of state, as required by section 2 of chapter 136 of the Laws of 1875, if not made to the reading of such affidavits, must be deemed to have been waived. []

Motion by defendant to vacate a levy under a warrant of attachment.

The motion was brought on by an order to show cause. Some of the moving affidavits had been verified before a commissioner of the state residing in Philadelphia, Pa., and were not certified to by the secretary of state, as required by section 2 of chapter 136 of the Laws of 1875.

The office of the Hat Sweat Manufacturing Company in the city of New York was managed by the secretary of that company, and he, on the application of the sheriff, and after the warrant had been executed in the manner required by subdivision 3 of section 649, furnished the certificate of the defendant's interest as required by section 650, which was 469 shares of the capital stock.

The other facts are sufficiently stated in the opinion.

Simon Sterne (Sterne & Thompson, attorneys), for motion:

Cited against the right to the attachment, *Moore v. Gennett*, 2 Tenn. Ch. (*Cooper*), 375; *Planters'*, etc., *Bank of Mobile v. Leavens*, 4 Ala. 753; *Ross v. Ross*, 25 Ga. 297; *Tingley v. Bateman*, 10 Mass. 343; *Christmas v. Biddle*, 13 Pa. St. 223; *Childs v. Dighy*, 24 Pa. St. 26; *Drake on Attachments*, §§ 244, 471, 474, 478.

Had the Hat Sweat Manufacturing Company been indebted to the defendant, and the bond or evidence of the indebtedness been within the jurisdiction of the

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court, then the attachment might have been sustained under section 648, which was intended to supersede the rule laid down in *Bates v. New Orleans, etc., R. R. Co.*, 4 Abb. 72; *Willet v. Equitable Ins. Co.*, 10 Abb. 193.

The court would have no power to compel the Hat Sweat Manufacturing Company, a foreign corporation, to transfer the defendant's shares to plaintiffs, even if the plaintiffs should recover judgment; *Cumberland Coal Co. v. Sherman*, 8 Abb. 243; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 48 Ill. 172; *Ducat v. Chicago*, 10 Wall. 410; *Farmers', etc., Ins. Co. v. Harrah*, 47 Ind. 236; *Phoenix Ins. Co. v. Commonwealth*, 5 *Bush (Ky.)*, 68; *State v. Fosdick*, 21 La. Ann. 434; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

Cited as to the nature of a corporate stock, *Montgomery Co. Bank v. Marsh*, 7 N. Y. 481; *Hyatt v. Allen*, 56 N. Y. 553; *Regina v. Arnaud*, 16 Law J., N. S., Q. B. 50.

Although a corporate body may carry on business beyond the territorial limits of the state which created it, it has no corporate existence beyond those limits; *Day v. Newark India Rubber Co.*, 1 Blatchf. 628; *Bank of Augusta v. Earle*, 13 Pet. 519, 588; *Ohio and Miss. R. R. Co. v. Wheeler*, 1 Black. 286.

Bettens & Lilienthal, opposed.

HAIGHT, J.—It appears from the papers read upon this motion that the plaintiffs and defendant are all non-residents of this State; that the plaintiffs procured a warrant of attachment to be issued herein, and the sheriff has served the same upon an officer of the Hat Sweat Manufacturing Company, at an office kept by it for the sale of goods in the city of New York, the sheriff giving the company notice that he attached the defendant's shares of stock in the company, and required the secretary to furnish him with a certificate of the

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number of shares of stock held by the defendant. The Hat Sweat Manufacturing Company is a foreign corporation, organized under the laws of Pennsylvania, and having its principal office and manufactory in the city of Philadelphia, and keeps an office in the city of New York for the sale of its goods in that city. None of the defendant's shares of stock in the corporation are, or have been at any time, in the State of New York.

This action is brought upon seven promissory notes aggregating the sum of \$18,014.47. It is for money demand. The service of the summons can only be made by publication or service without the State. Jurisdiction can only be acquired by the levying of an attachment upon the property of the defendant within ['] the State. (*Code*, §§ 1216, 1217, 635, 707.) The question, therefore, presented by this motion, is whether or not the sheriff has levied upon the property of the defendant. The levy was made under section 647 of the Code, which reads as follows: "The rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had, when they were so attached."

It is contended on the part of the defendant that this section has reference only to domestic associations and corporations; that the property levied upon must be within the jurisdiction of the court, and that the stock of a foreign corporation is not within the jurisdiction of the court, unless the certificates issued by the corporation to the individual owning the stock are, in fact, within the State. Section 644 of the Code provides that the sheriff must execute the warrant, etc., "by levying upon so much of the personal and real property of the defendant, *within his county*, * * * as will satisfy

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the plaintiff's demand," etc. Section 646 provides that a warrant of attachment against a foreign corporation may be levied by the sheriff upon a sum unpaid upon the subscription to the capital stock of the corporation, made by a person *within the county*, or upon one or more shares of stock therein, held by such person, or transferred by him, for the purpose of avoiding the payment thereof. Section 648 provides that an attachment may be levied upon an execution arising upon a contract; including a bond, promissory note, or other instrument for the payment of money only, etc., which belongs to the defendant and is found *within the county*. It will be observed from these various sections, that in each instance where levy is made, it must be upon the property within the county, etc. The various provisions of the Code must be considered together in construing any particular section thereof. The section under consideration, together with the sections referred to, are the ones providing the cases in which attachments may [?] issue and levies be made thereon. In considering this section with those that precede and follow it, it appears to me, that the evident intent of the legislature was, that the rights or shares of stock in the association or corporation which it provided could be levied upon, were such rights or shares as were within the county [?] or jurisdiction of the court. The certificate of stock issued by the corporation to the defendant is not, nor has not been, within the State; neither is the stock of The Hat Sweat Manufacturing Company within the State. It is a foreign corporation, doing business under another jurisdiction, subject to other laws, and the judgments and decrees of other courts.

I have been unable to find any reported cases in this State precisely in point, but the tendency of the authorities is in accord with the construction here given (Bates v. New Orleans, J. & G. N. R. R., 4 Abb. Pr. 72;

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Willett *v.* Equitable Ins. Co., 10 *Id.* 193; Smith *v.* American Coal Co., 7 *Lans.* 317; *Drake on Attachments*, §§ 471, 474).

It is claimed on the part of the plaintiffs that the order to show cause, granted herein, does not specify any irregularity. I understand the motion to be based upon the merits, and not upon an irregularity.

[⁴] It is contended further, that some of the moving affidavits were verified before a commissioner of the State, and that such verification is not certified by the secretary of state, etc. The certificate of the secretary of state I understand to have been waived. If not waived, the plaintiffs should have objected to the reading of the affidavits upon the motion. Not having so objected, they must now be deemed to have waived the same.

Motion to discharge the levy should be granted, with \$10 costs.

CLIFTON, RESPONDENT, *v.* BROWN AND ANO.,
APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
MAY, 1882.

§ 542.

Pleadings.—Amendments, of course.—Service of notice of trial or argument is not a waiver of right to so amend.

Section 542 of the Code of Civil Procedure contemplates that a party may amend his pleading, of course, within the time allowed by law; and that his plea shall stand, if it be not amended for the purpose of delay, and his adversary would thereby lose the benefit of a term, for which the cause is, or might be, noticed.^[1]

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The service of a notice of trial, or of argument, is not a waiver of the right to amend, of course.^[*]

Phillips *v.* Suydam^{*} (6 Abb., N. S., 289 [S. C. 54 Barb. 153]), disapproved.^[*]
(Decided May 27, 1882.)

Appeal by defendants from an order of the special term, denying a motion to strike out an amended complaint.

The original complaint was served on the 22d of December, 1881. The further facts are stated in the opinion.

Joseph D. Fay, for appellant:

Urged that the plaintiff waived his right to amend, of course, by serving a notice of trial, Phillips *v.* Suydam, 6 Abb., N. S., 289; *Van Santvoord's Pl.* 796; Cusson *v.* Whalon, 5 How. 302; Stilwell *v.* Kelly, 37 N. Y. Super. 417. The defendant adopted the proper remedy, in moving to strike out the amended complaint, Ostrander *v.* Conkey, 20 Hun, 421.

H. S. Gulliver, for respondent.

By the Court.—BRADY, J.—It appears that on the 11th of January, 1882, a demurrer to the complaint was served upon the plaintiff's attorney. On the following day he served a notice of trial of the issue of law for the first Monday in February. The defendant's attorney served a similar notice. On the twenty-sixth of

* Phillips *v.* Suydam was followed as *stare decisis* in Reilly *v.* Byrne, 1 Civ. Pro. R. 201.

For recent cases bearing upon section 542, see George *v.* Grant, 56 How. 244; Welch *v.* Preston, 58 Id. 52; People *v.* Whitwell, 62 Id. 383, approving Robertson *v.* Bennett, 1 Abb. N. C. 478, S. C. 52 How. 287; Frank *v.* Bush, 64 Id. 282; Branagan *v.* Palmer, 5 W. Dig. 521; Spuyten Duyvil Rolling Mill Co. *v.* Williams, 1 Civ. Pro. R. 280; Hitchcock *v.* Baere, 17 Hun, 604; Ostrander *v.* Conkey, 20 Id. 421; Decker *v.* Kitchen, 21 Id. 382.

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January, the plaintiff's attorney served an amended complaint, which was returned on the next day, upon the ground that the right to serve the same had been waived by the service of notice of trial. The defendant thereupon moved to strike out the complaint. His motion was denied, and hence this appeal.

By section 542 of the Code, it is provided that within twenty days after the pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had. But if it be made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the case is, or may be, noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just. This section is similar to section 172 of the former Code.

In the case of *Phillips v. Suydam* (6 Abb., N. S., 289), it was declared by a divided court, that the act of a party in noticing a cause for trial is a waiver of his right to amend his pleading, without leave. It appeared in that case that both parties noticed the cause for trial, and before the expiration of twenty days from the service of the original answer, the defendant's attorney served an amended answer, alleging usury, which the plaintiff's attorney declined to receive, on the ground that the defendant by noticing his cause for trial had waived the right to amend, and, under such circumstances, the plaintiff would not accept an unconscionable answer. The defendant's attorney subsequently moved for an order requiring the plaintiff to receive it. Mr. Justice INGRAHAM, in denying the motion, said that noticing the cause for trial prevented an amendment of the

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pleadings of the party giving the notice ; that the answer showed no defense except that of usury, and that, under the circumstances of the case, the defendant should not be allowed to make that defense.

Judge CARDOZO, in deciding the appeal taken from the order of Judge INGRAHAM, amongst other things, said, that where a party noticed a cause upon the pleadings as they stood, he thought he must be considered as waiving the right to amend his pleadings, as of course, and must be regarded as having elected to stand by the issue as then framed. Justice CLERKE, dissenting, declared, however, that the defendants had a clear right under section 172 of the Code to serve an amended answer, unless the service of a notice of trial by them was a waiver of that right, and that service of such notice did not prejudice them in any way ; that the right to serve the amended answer, unless the plaintiff was damnified by it, as, for instance, by throwing the case over the circuit, as contemplated by section 172 of the then existing Code, could not be interfered with ; that nothing of that kind appeared in the case, and therefore the defendants had lost nothing by the fact of noticing the cause for trial.

In Washburn *v.* Herrick (4 How. Pr. 15), to which reference is made in the case of Cusson *v.* Whalon (5 How. Pr. 302), it is said, that if the plaintiff notices a cause for trial before the defendant's time to amend expires, he does so at his peril ; and, as said in the case of Cusson *v.* Whalon, Mr. Justice GRIDLEY set aside the judgment where the defendant demurred to the complaint, noticed it for argument, and took judgment by default within twenty days after service of the demurrer, and before service of the amended complaint, which was allowed to be put in within that period, although he admitted that both sides had the right to notice the cause. This case, although relied upon by the appell-

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lant herein, is substantially a recognition of the proposition, that noticing the cause for argument prior to the expiration of the time allowed to amend, is to be regarded as an act done at the peril of the party serving the notice.

In the case of *Ostrander v. Conkey* (20 Hun, 421), it was declared, where after issue had been joined in an action and the same had been regularly noticed for trial at circuit by the defendant, the plaintiff, in good faith, and within the time allowed by law, served an amended complaint, that the issue theretofore joined and noticed for trial was destroyed; but that where the amended pleading was served in bad faith, the remedy of the party aggrieved was by motion to strike it out. And it must be noted that, in this case, there is no charge of bad faith, and no charge that the amended complaint was interposed for the purpose of delay. This case just cited was a general term adjudication, and the doctrine laid down in *Washburn v. Herrick* was recognized and approved, viz.: that where the party notices his cause for trial within the time allowed to his adversary to amend, he does so at his peril.

[¹] Section 542 of the Code, to which reference has been made, contemplates the rulings which have been made by these cases, viz.: that the party may amend within the time allowed by law, and that his plea must stand unless it be made to appear that it was amended for the purpose of delay, and that the adverse party would lose

the benefit of a term for which the cause was, or may [²] be, noticed. It must be said, therefore, that the case of *Phillips v. Suydam* cannot be sustained as an authority, and it is to be presumed that the amendment made therein was not sustained, for the reason that it presented what was regarded as an unconscionable defense.

[³] It seems to be very clear that the right to amend

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existed under section 542 of the Code, and that the service of notice of argument was not a waiver of that right. That section provides for a case in which notice of trial has been served, and the only penalty imposed is that the amended pleading shall be stricken out, if interposed for the purpose of delay.

For these reasons, the order should be affirmed, with ten dollars costs and disbursements.

DANIELS, J., concurred.

WRIGHT *v.* FIELD.

N. Y. SUPERIOR COURT, SPECIAL TERM; OCTOBER, 1882.

§§ 449, 481, 558.

Order of arrest.—Should be vacated when complaint fails to allege a sufficient cause of action.—*Action for conversion of corporate stock.*—Complaint must allege ownership, or general or special property in stock.—Nature of corporate stock.—For the purposes of an action for conversion, deposit of, for safe-keeping, does not create property in, when it did not previously exist.—When presumption of lawful possession, does not apply to holder of corporate stock.

Where the complaint in an action for the conversion of corporate stock alleged, in substance, that the plaintiff deposited with the defendant certain certificates of mining stock, and that the defendant accepted the custody of such certificates, and promised and agreed to keep the same with due and reasonable care, and to hold the same for the plaintiff, subject to his orders and directions; and that the defendant, without the knowledge or consent of the plaintiff, fraudulently sold and delivered the stock, and the certificates thereof, and fraudulently embezzled and misappropriated the proceeds of such sale [].—*Held*, on motion by defendant to vacate an order of arrest on the ground that the complaint failed to set forth a sufficient cause of action, in that it contained no allegation of ownership by the plaintiff of the certificates or the stock mentioned in the complaint:

That as the Code requires the facts out of which a cause of action arose

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to be stated, and the action to be prosecuted in the name of the real party in interest,[⁷] the fact that the plaintiff had the certificates of stock in his possession and had deposited them with the defendant for safe-keeping, did not necessarily show that the title was in him, or that he was, in truth, the owner, or had a property general or special in the certificates or the stock.[⁷] For, in the nature of corporate stock, the certificates might be held by one who had no interest or property in the stock, and the person in whom the property or interest vested, would depend upon the registry of the stock, or upon the name appearing upon the face of the certificate.[⁷] Stock is incapable of manual possession, and is not transferable by mere delivery of the certificate therefor, and possession must be deemed to follow the title and cannot exist separately:[⁷] *

That although to maintain such an action, it would be sufficient for the plaintiff to allege that he was the owner or lawfully entitled to possession, without setting forth the manner or source of his title to the stock,[⁷] still, this action not being one for a breach of contract for failing to hold the stock, the plaintiff did not acquire a special property in the certificates by the undertaking of the defendant; the action being for a conversion, if the plaintiff was not the owner, or lawfully entitled to possession by virtue of a general or special property when the deposit was made, such deposit could not, of itself, constitute him the owner, and his title would be no better after deposit than before:[⁷]

That the presumption of lawful possession attaching to the holder of an ordinary chattel, or of a promissory note payable to bearer, does not apply to the holder of certificates or shares of stock, unless the same stand in the name of the holder, or are accompanied by documentary evidence of transfer:[⁷]

That the complaint not stating a sufficient cause of action, by reason of the omission to allege ownership or property in the plaintiff, the order of arrest should, therefore, be vacated.

* Consult, as to the nature and properties of corporate stock, *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211; *Onondaga Trust and Deposit Co. v. Price*, 87 *Id.* 542, 549; *Driscoll v. West Bradley and C. M. Co.*, 59 *Id.* 96, 103; *Holbrook v. New Jersey Zinc Co.*, 57 *Id.* 616, 632; *Weaver v. Bardeen*, 49 *Id.* 286, reversing 8 *Lans.* 888; *Leitch v. Wells*, 48 N. Y. 585, 618; *McNiel v. The Tenth National Bank*, 46 *Id.* 825, 839; *People v. Commissioners of Taxes*, 85 *Id.* 480; *City of Utica v. Churchill*, 83 *Id.* 161, 237; *People v. Commissioners of Taxes*, 28 *Id.* 192, 220; *Mechanics' Bank v. New York and N. H. R. R. Co.*, 18 *Id.*, 599, 626; *Williams v. Western Union Tel. Co.*, 9 *Abb., N. C.*, 487; *Williamson v. Mason*, 12 *Hun.* 97, 105.

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Motion by defendant to vacate an order of arrest.

The opinion states the facts.

Daniel E. Sickles (M. B. Field, attorney), for motion.

Richards & Brown, opposed.

VAN VORST, J.—This is a motion to vacate the order of arrest in this action. The motion is founded upon the complaint exclusively. The ground urged by the defendant's counsel in support of the motion is, that the complaint does not state facts constituting a cause of action. It is provided in the Code of Civil Procedure, in substance, that the order of arrest must be vacated, if the complaint fails to state a cause of action (§ 558). The action is to recover damages for the alleged conversion of certificates of stock in a mining company.

Several objections are taken by the defendant's counsel to the sufficiency of the complaint, but it will not be necessary to examine more than one of them.

[1] The complaint alleges, "that on or about the 10th day of May, in the year 1882, the plaintiff deposited for safe-keeping with the said defendant, as plaintiff's broker, certificates for 1,000 shares of the capital stock of the Robinson Consolidated Mining Company, and the said defendant thereupon accepted the custody of said stock certificates, and promised and agreed to, and with the plaintiff, to keep the said stock for the plaintiff, with all due and reasonable care, and to hold the same for the plaintiff, subject to the plaintiff's orders and instructions." The complaint then alleges that, without the plaintiff's knowledge or consent, the defendant fraudulently sold the stock and delivered the same, and the certificates thereof, to the purchasers, and that the proceeds were embezzled and fraudulently misapplied by the defendant to his own use.

The point of the defendant's objection is, that there

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is no allegation of the ownership by the plaintiff of the certificates or the stock.

The objection is well taken. The action of trover lies for the recovery of damages for the wrongful conversion of personal property, to which the plaintiff has title, either absolutely or specially (*Graham's Practice*, 88).

[³] The Code requires that the facts out of which the cause of action arises should be stated,* and that the action should be prosecuted in the name of the person who has the interest in the property the subject of the action.† The complaint should distinctly disclose the plaintiff's interest in the subject matter. In an action for conversion of personal property, the plaintiff's interest, whether absolute or special, should appear by the complaint. That is clearly necessary in the case for the conversion of property such as is here involved. Pleadings cannot be upheld by implication in the pleader's favor, unless they be absolutely necessary.

[³] The fact that the plaintiff had the certificates of the stock in his possession, and had deposited them with the defendant for safe-keeping, does not necessarily show that the title was in him, or that he was, in truth,

the owner, or had a property general or specific in

[⁴] the certificates of stock. One may hold a certificate for shares of stock, and yet have no interest or property in the stock. As to the person in whom the property or interest was vested, would depend upon the registry of the stock, or whose name appeared upon the face of the certificate as the owner. Stock is not transferred by a mere delivery of the certifi-

[⁵] cates therefor. Something more is required. In *Onondaga Trust Co. v. Price* (87 N. Y., 542, 549), it is said by RAPALLO, J., that shares of stock are incap-

* Section 481, subd. 2.

† Section 449.

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ble of manual possession ; "the shares are a description of the property of which the possession must be deemed to follow the title and cannot exist separately."

[¶] The possession of one who holds an ordinary chattel, or a promissory note payable to bearer, is presumed to be lawful ; but such presumption would not apply to the holder of certificates or shares of stock, unless the same stood in his name or was accom-

[¶] panied by documentary evidence of a transfer. I do not mean to be understood, however, as urging that it is necessary to allege in a complaint, the manner or source of the plaintiff's title to shares of stock, in order to enable him to maintain an action for conversion. It would doubtless be sufficient to allege that he was the owner, or lawfully entitled to the possession.

In Mr. Moak's edition of Van Santvoord's Pleadings, page 213 (marginal, 275), it is said that, in an action for damages for the conversion of personal property, "the old requisites of the declaration as to matters of substance are still preserved. The complaint should state that the plaintiff was possessed of the goods, as of his own property, and a general allegation of ownership * * * is sufficient." * * *

And Mr. Abbott, in his volumes of Forms of Pleadings under the Code (vol. 1, page 457), gives the method of statement in this way : * * * "That the plaintiff was lawfully possessed of * * * (or * * * was entitled to the immediate possession of) the goods as his property" (*Selwyn's Law of Nisi Prius*, vol. 2, 13th edition, pages 1276, 1288).

The question under consideration is not one of proof on the trial, but one of pleading exclusively. The precise point was decided in *Scofield v. Whitelegge* (49 N. Y., 259). It is true, that the question which arose there, was in an action for the claim and delivery of personal property. But I apprehend that no different

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rule applies in an action for conversion in this regard; (*Van Der Minden v. Elsas*, 36 *Super. Ct. R.*, 66).

It is, however, urged by the plaintiff's counsel that, by the agreements between the parties, the defendant undertook to hold the property for the plaintiff, and that by such agreement, the plaintiff acquired a special property in the certificates.

[⁸] This is not an action for damages for a breach of contract. The action is brought for the conversion. If the plaintiff was not the owner, or lawfully entitled to the possession, in virtue of a general or special property therein when the deposit with the defendant was made, such deposit of itself could not constitute him such owner. His title, in truth, could be no better after the deposit than before.

The motion to vacate the order of arrest should be granted.

HOLSMAN, APPELLANT, v. ST. JOHN, RESPONDENT.*

N. Y. SUPERIOR COURT, GENERAL TERM ; MAY, 1882.

§§ 755-760.

Continuance of action.—Code provisions as to, do not include a case where both parties are dead.—Death of both parties is a bar to motion to revive.

The provisions of the Code of Civil Procedure, directing the continuance of an action by or against the representative of a party to such action, who has died since the commencement thereof, do not include a case in which all of the parties to the action are dead at the time of making a motion to revive. In such a case, at common law, the action would abate. [⁹]

Where both the sole plaintiff and the sole defendant were dead, and the administrator of the plaintiff moved to revive the action against the

* An appeal to the court of appeals, is pending

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executors of the defendant,—*Held*, affirming the special term, that the death of both parties was a bar to the motion, and that the court no longer had jurisdiction.^[1]

(Decided June 19, 1882.)

Appeal from an order of the special term, denying a motion made by the administrator of the plaintiff to revive the action against the executors of the defendant.

The action was commenced in October, 1859, and was brought to recover the sum of \$575.54, that amount having been expended by the plaintiff in the payment of taxes and assessments imposed upon certain premises in the city of New York, leased by the defendant from the plaintiff, the lease of such premises being under seal, and the defendant having therein covenanted and agreed to pay such taxes and assessments.

The other facts are stated in the opinion.

B. T. Kissam, for appellant:

The cause of action having arisen out of a breach of covenant, on the part of the defendant, in a lease under seal, it survived the death of the plaintiff and passed to her administrator (*Zabriskie v. Smith*, 13 N. Y. 322; *McGregor v. McGregor*, 35 *Id.* 220; *Potter v. Van Vranken*, 36 *Id.* 623), and, therefore, the action did not abate, (*Section 755, Code of Civil Procedure*; *Livermore v. Bainbridge*, 49 N. Y. 128).

F. G. McDonald, for respondent:

The court has no jurisdiction of the action, nor of the parties or their representatives. By the common law, the death of either party to an action before judgment, abated the action.

Section 757 of the Code of Civil Procedure provides for the revival of an action in the event of the death of "a sole plaintiff, or a sole defendant." There is no section of the Code, nor is there any statute of this State,

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providing for the revival of an action in the event of the death of both the plaintiff and the *defendant*.

In *Coit v. Campbell* (20 *Hun*, 50, affirmed 82 *N. Y.* 509), it was held, that section 757 of the Code of Civil Procedure was inapplicable, except in cases coming entirely within its language.

By the Court.—**FREEDMAN**, J.—This action came on for trial in March, 1861, and the trial was ended by the withdrawal of a juror, at plaintiff's request. Since that time, both parties to the action died, the plaintiff on December 22, 1864, and the defendant on July 22, 1879. Up to the time of defendant's death no further step had been taken in the action by the plaintiff or her representatives.

On October 31, 1881, an order was obtained from one of the judges of this court, requiring the executors of the deceased defendant to show cause why the action should not be continued in the name of the administrators of the deceased plaintiff. Upon the hearing, the motion was denied. Indeed, I do not see how it could have been granted. Aside from the objection founded upon the lapse of nearly seventeen years since the plaintiff's death, the death of both parties to the action was a bar to the motion.

[¹] The court had no longer any jurisdiction in the premises. The provisions of the Code directing a continuance of the action, by or against the representative of a party to the action who died since the [²] commencement of the action (§§ 755-760), do not include a case in which all the parties to the action are dead at the time of the motion; and by the common law the action abated.

The order should be affirmed, with costs.

SEDGWICK, Ch. J., and **ARNOUX**, J., concurred.

New York Central and Hudson River Railroad Co. v. Pettit.

N. Y. CENTRAL AND HUDSON RIVER R. R. CO.
v. PETTIT, ADMINISTRATRIX, ETC.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM ;
OCTOBER, 1882.

§§ 757, 765.

Continuance of action.—When sole defendant dies prior to decision, action should be continued before decision is rendered.—If decision were made before continuance, it would be void.—What is the proper course for the court to pursue, in such a case.

Where an action was tried before the court, without a jury; and, before any decision had been rendered, the sole defendant died,—*Held*, that the action should, on motion, be continued against the survivor of the defendant before the decision could be rendered; that after the death of the defendant, should the decision be rendered before the continuance of the action, such decision would, under section 765 of the Code, be void.

The proper course to be pursued by the court in such a case is, it seems, to allow all the proceedings taken prior to the death of the defendant to stand, and to entertain a motion to continue the action against the successor of the defendant, and when that motion has been disposed of, then to render the decision.

Determination made on the suggestion of the death of the defendant.

The action was brought to restrain the execution of a warrant in summary proceedings. The complaint alleged that the plaintiff was the landlord of the premises, and that the defendant, without title, had instituted such proceedings against its tenant, and that his possession was about to be disturbed.

The other facts are stated in the opinion.

Frank Loomis, for plaintiff.

G. S. Wilkes, for defendant.

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LAWRENCE, J.—After this cause was tried before me, without a jury, and before I had rendered any decision, it was suggested that the defendant had died. On this state of facts, should I proceed to render my decision, or should a motion be made to continue the action against the successor of the deceased defendant? By section 757 of the Code of Civil Procedure, it is provided that: “In case of the death of a sole plaintiff, or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative, or successor in interest.” Mr. Throop, in his note, says, that the second sentence in this section, was amended in 1879 so as to *require a motion to be made in every case*. It would seem, therefore, that before a decision can be rendered by me, the action should, on motion, be continued against the successor of the defendant. Again, section 765 of title 4 of chapter 8 of the Code of Civil Procedure, being the title in which section 757 is contained, is as follows: “This title does not authorize the entry of a judgment against a party, who dies before a verdict, report, or decision is *actually rendered against him*. In that case, the verdict, report, or decision is absolutely void.”

If I were to proceed further before the action is continued, by the provision of the section just quoted, any decision which I might render would be void. It seems to me that the proper course to be pursued in this case, is to allow all the proceedings thus far taken to stand, and to entertain a motion that the action be continued against the successor of the defendant. When that motion has been disposed of, and not until then, this case can be decided.

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IN THE MATTER OF WILSON & GREIG, BANKRUPTS.

**U. S. DISTRICT COURT, SOUTHERN DISTRICT OF N. Y.,
IN BANKRUPTCY ; JUNE, 1882.**

§ 66.

Attorneys' liens.—What is the retaining lien.—Cannot be enforced under Chapter 788, Laws of 1869.—What is the charging lien.—To what not extended.—Upon uncollected judgment, lien cannot be extended to include subsequent services in independent matters.—Code lien upon client's cause of action, extends only to services and charges in the particular action.

Attorneys' liens are of two kinds. First: A retaining lien, which is general, and rests wholly upon possession, and is a mere right to retain all papers, deeds, vouchers, etc., upon which he has expended money or given professional services, until the entire amount of his bill is paid.^[1] It is a mere possessory lien, and purely passive, and the papers to which it attaches cannot be parted with without loss of the lien, nor can any active proceedings be taken, either at law or in equity, to procure payment out of the documents so held.^[2] Chapter 788 of the Laws of 1869, in relation to the enforcement of possessory liens, applies only to liens upon "chattel property," and mere choses in action, such as notes or demands placed in the hands of an attorney for collection, are not "chattel property," and not within the statute.^[3] The retaining lien of an attorney upon notes and demands in suit cannot be transferred, and does not attach to the judgment obtained upon such notes and demands, nor to the proceeds thereof, unless such proceeds come into the possession of the attorney.^[4]

Second: A charging lien, which exists upon a judgment recovered by an attorney, or money payable thereon, or upon some fund in court. It does not depend upon possession, and active steps may be taken to secure its payment. It is an equitable right which rest upon the compensation due to the attorney for his services and money expended in procuring the judgment, or in securing the fund, and it cannot, upon principle, be extended beyond services and expenses in the suit itself, or in some other proceeding by which the fund has been secured or recovered, or in the same subject-matter.^[5]

An attorney who recovers a judgment, but does not collect the amount thereof, is not entitled to any lien upon such judgment, beyond the com-

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pensation due him for his services in the particular case wherein the judgment was recovered; [¹¹] and he cannot increase the amount of his lien upon such judgment by subsequent services in independent matters. [¹²] Section 66 of the Code of Civil Procedure, which gives an attorney "a lien upon his client's cause of action," from the commencement of the action, refers only to the attorney's services and charges in that action [¹³] The holdings of the cases upon the nature and extent of an attorney's lien, before and under the Code, stated. [^{6, 8, 10, 12, 13, 14}] *Bowling Green Savings Bank v. Todd* (52 N. Y. 489, affirming 64 Barb. 146), and *Schwartz v. Jenney* (21 Hun, 33), distinguished. [^{6, 7, 12, 14}]

Motion by petitioner, J. H. Goodman, former attorney for the bankrupt firm of Wilson & Greig, to confirm the report of a register in bankruptcy, allowing a certain sum in discharge of the petitioner's lien for costs and services.

The petitioner was the attorney for Wilson & Greig prior to the appointment of the assignee in bankruptcy, and was engaged in the prosecution of several actions in their behalf. In January, 1879, he recovered in a State court, by default, upon promissory notes, two judgments against one James Wilson, for about \$897 each ; and in May, 1879, he also recovered in a State court, a judgment against Hine and Phillips for \$4,581.07, the costs in which action were taxed at the sum of \$326.29.

In the early part of June, 1879, and while the executions issued upon these judgments were still uncollected and in the hands of the sheriff, the assignee in bankruptcy was appointed. The assignee desiring to employ other attorneys in the prosecution of the actions and the collection of the judgments, and the petitioner claiming a general lien for his costs and services upon all the papers in his hands, an agreement was made on June 7, 1879, which recited that, the petitioner had commenced a number of suits against debtors of the said Wilson & Greig, which suits had not been finally concluded, and that the assignee recognized the petitioner's lien on such papers, and desired them all to be surrendered to other

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attorneys who should be substituted ; but that the petitioner's lien should not be waived by such surrender ; and that the "lien should first be paid and satisfied by the first moneys coming into the hands of said assignee out of said suits, a list of which is annexed." Among the papers delivered over were those in the actions against James Wilson and in the action against Hine and Phillips, and the receipt given therefor by the substituted attorneys recited, that the surrender of the papers was upon the terms and conditions agreed upon between the petitioner and the assignee.

The executions upon these judgments having been returned wholly unsatisfied, the substituted attorneys, in proceedings supplementary to execution, collected, in May, 1880, the entire amount of the judgments against James Wilson, but they did not succeed in collecting anything upon the judgment against Hine and Phillips, and the total amount collected by the assignee on account of the various other actions was \$144.57.

On account of the judgment recovered against Hine and Phillips, the petitioner had received the sum of \$43.86, and he claimed, when the judgments against James Wilson had been collected, that the lien for his entire bill attached to all of the papers which had been in his hands, including the promissory notes upon which the judgments against James Wilson were recovered ; that he had a general lien upon each and all of the actions and judgments for his whole bill ; and that his taxed costs and charges for his services in the action against Hine and Phillips, should be paid out of the amount collected upon the judgments against James Wilson. The assignee refused to recognize such claim, and the matter was referred to a register, who reported that the services of the petitioner in the action against Hine and Phillips were reasonably worth the sum of \$500 ; which, together with the costs taxed in that

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action, made the sum of \$826.69, and that after deducting the sum of \$43.86, already received by the petitioner on account, there remained justly due to him in that action the sum of \$782.83, which should be paid from the amount collected upon the judgments against James Wilson.

S. B. Hamburger, for petitioner :

Cited as estopping the assignee from questioning the lien, *Pope v. O'Hara*, 48 N. Y. 447, 456; *Dezell v. Odell*, 3 *Hill*, 222; *Carpenter v. Stilwell*, 12 *Barb.* 128; 2 *Smith L. Cas.* 672.

And as to the force and extent of the petitioner's lien, *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; In the Matter of the Application of Knapp, 85 N. Y. 284; *Schwartz v. Jenney*, 21 *Hun*, 33; 1 *Wait's Pr.* 246, 247; *Bump's Law and Pr. of Bank*, 601 (10 Edition); In the Matter of Orrin Brown, 5 *Law Rep.* 324; *In re N. Y. Mail Steamship Co.*, 2 *B. R.* 74; *Code of Civil Procedure*, § 66, as amended in 1879.

A. Blumenstiel (*Blumenstiel & Hirsch*, attorneys), for assignee :

Cited against the general lien claimed by the petitioner, *Haight v. Holcomb*, 7 *Abb.* 210; *Power v. Kent*, 1 *Cow.* 172; *Phillips v. Stagg*, 2 *Edw. Ch.* 108; *Keenan v. Durfinger*, 12 *Abb.* 327 (note); *Fox v. Fox*, 24 *How.* 409; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. 368; *Adams v. Fox*, 40 *Barb.* 442; *Marshall v. Meech*, 51 N. Y. 140; *Pulver v. Harris*, 52 N. Y. 73; *Howland v. Taylor*, 6 *Hun*, 237; *Prentiss v. Livingston*, 60 *How.* 380; *McCabe v. Fogg*, 60 *Id.* 488; *Wehle v. Conner*, 83 N. Y. 231; In the Matter of the Application of Knapp, 85 N. Y. 284.

BROWN, J. — It is not disputed that the sum of \$826.69 would be a fair compensation to the petitioner

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for his services to the bankrupts in obtaining the judgment against Hine and Phillips, in May, 1879. Nothing, however, has been recovered thereon. All claims of the petitioner, aside from those connected with that judgment, have been paid ; and the only question presented is, whether the petitioner has a right to be paid the balance of \$782.83 due to him for his services and costs in obtaining this judgment, out of the proceeds collected by the assignee, through his subsequent attorneys, upon the two Wilson judgments recovered in January, 1879.

The effect of the agreement of June 7, 1879, between the assignee and the petitioner, was to preserve whatever lien or equitable rights the petitioner then had. It was sufficient for this purpose ; it was not intended for any other purpose ; it was not approved by the court ; and if its terms were in fact such as to enlarge the petitioner's claims beyond his then existing legal lien, it would not bind the bankrupts' estate, and the petitioner would be obliged to resort to his personal remedy against the assignee. The assignee, however, took the bankrupts' estate charged with whatever legal or equitable lien existed against it in favor of the petitioner, and by the agreement then made, these liens were preserved as they existed at that date.

On the part of the assignee, it was contended, that nothing having been collected by the petitioner upon the two judgments against James Wilson, the attorney's lien thereon was limited to his taxed costs and reasonable compensation in obtaining those judgments. The petitioner contends that his general lien for his whole bill, which legally attached upon the papers in his hands, including the notes upon which the judgments were maintained, followed the judgments, and legally bound whatever money was subsequently collected thereon by the assignee.

After examination of the numerous authorities on

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this subject, English and American, I am satisfied that the claim of the petitioner cannot be sustained, and that an attorney has no general lien upon an uncollected judgment for services in other suits, but only a particular lien for his costs and compensation in that particular cause.

[¹] An attorney's lien, as now generally recognized, is of two kinds : First, a general lien resting wholly upon possession, which is a mere right to *retain* until his whole bill is paid, all papers, deeds, vouchers, etc., in his possession, upon which, or in connection with which, he has expended money or given his professional

[²] services. This "*retaining lien*" is a general one for whatever may be due to him ; and though a client may change his attorney at will, if the latter be without fault and willing to proceed in pending causes, none of the papers or vouchers can ordinarily be withdrawn from him, except upon payment of his entire bill for professional services (*In re Paschal*, 10 *Wall.* 483, 493-6 ; *In the Matter of Orrin Brown*, 1 *N. Y. Leg. Obs.* 69 ; *In the Matter of Broomhead*, 5 *Dowl. & L.* 52 ; *Blunden v. Desart*, 2 *Dru. & Warr.* 405, 423 ; *Ex parte Nesbitt*, 2 *Sch. & Lef.* 279 ; *Ex parte Sterling*, 16 *Ves.* 258 ; *Griffiths v. Griffiths*, 2 *Hare*, 592 ; *Ex parte Pemberton*, 18 *Ves.* 282 ; *Lord v. Wormleighton*, 1 *Jacob*, 580 ; *Bozon v. Bolland*, 4 *Myl. & C.* 354, 356 ; *Ex parte Yalden*, *L. R.*, 4 *Ch. Div.* 129 ; *Colmer v. Ede*, 40 *L. J.*, *N. S. Chanc.* 185 ; *Hough v. Edwards*, 1 *Hurl. & N.* 171 ; *Cross on Law of Liens*, 216 [18 *Law Library* 147] ; *Stokes on Liens of Attorneys*, 28, 38 ; 2 *Kent*, * 641). This lien, like other mere possessory liens, is, however, purely passive, being a bare right to hold possession till payment.

[³] The articles cannot be sold or parted with without loss of the lien, nor can any active proceedings be taken at law or in equity to procure payment of the debt

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out of the articles so held, (*Cross on Law of Liens*, 47, 48, [18 *Law Library*, 47, 48]; *Thames Iron Works Co. v. Patent Derrick Co.*, 1 *J. & H.* 93; *The B. F. Woolsey*, 4 *Fed. Rep.* 552, 558). The statute of this State, passed May 8, 1869 (*Laws 1869, Chap.* 738), which was designed to afford means of realizing payment upon such mere possessory liens, applies only to liens "upon any *chattel* property." Mere choses in action, such as the notes or demands placed in the petitioners hands for collection, are not "chattel property" (2 *Bl. Com.** 387; *Ingalls v. Lord*, 1 *Cow.* 240; *Ransom v. Miner*, 3 *Sandf.* 692), [1] and, therefore, not within the statute. As this general lien of the attorney upon the notes, and demands in suit depended wholly upon possession, and was a mere right of retention, incapable of any active proceedings to enforce payment, could not be transferred, nor attach to the judgments obtained upon them, or to any proceeds thereof, unless such proceeds came into the attorney's possession, which is not the fact in this case.

[2] The second kind of lien which an attorney has, is that existing upon a judgment recovered by him, or moneys payable thereon, or upon some fund in court. This lien, so far as it extends, is not merely a passive lien, but entitles the attorney to take active steps to secure payment. It did not exist at common law. It is stated by Lord MANSFIELD to be not very ancient. (1 *Doug.* 104; *Stokes on Liens of Attorneys*, 3.) It does not depend upon possession, but upon the favor of the court in protecting attorneys as its own officers, by taking care, *ex aequo et bono*, that a "party should not run away with the fruits of the cause, without satisfying the legal demands of the attorney by whose industry and expense those fruits were obtained." (Read *v. Dupper*, 6 *T. R.* 361.) As this equitable right rests solely upon the compensation due to the attorney for his services, and money expended in procuring the judgment or the fund secured,

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it is manifest that it cannot, upon principle, be extended beyond the services and expenses in the suit itself, or in any other proceedings by which the judgment or fund has been recovered, or in the same subject-matter.

The distinction between an attorney's "retaining lien" upon papers in his possession, and his "charging lien" upon a judgment or other fund, is carefully pointed out by the lord chancellor in *Bozon v. Bolland* (4 *Myl. & C.* 354, 359): "The solicitors claim upon the fund," he says, "has been called transferring the lien from the document to the fund recovered by its production. But there is no transfer; for the lien upon the deed remains as before, though perhaps of no value; and whereas the lien upon the deed could never have been actively enforced, the lien upon the fund, if established, would give a title to payment out of it. The active lien upon the fund, if it exists at all, is newly created, and the passive lien upon the deed continues as before. If the doctrine contended for were to prevail, the lien of the solicitor upon the fund realized would, in most cases, extend to his general professional demand, and not to be confined, *as it always is, to the costs in the cause*; for it must very generally happen that the plaintiff's solicitor has in his hands the documents necessary to establish his clients title to the money."

In *Lann v. Church* (4 *Madd.* 207), the vice-chancellor said, that he "had not been able to find any case in which it had been held that a solicitor had any lien on the fund recovered in the cause, except for his costs incurred in such cause."

Such is the well-established English practice (*Stephens v. Weston*, 3 *B. & C.* 535, 538; *Hodginson v. Kelly*, 1 *Hogan*, 388; *Hall v. Laver*, 1 *Hare*, 571, 577; *Perkins v. Bradley*, *Id.* 219, 231; *Lucas v. Peacock*, 9 *Bear.* 177; *Stokes on Liens of Attorneys*, 138).

The same principle has been repeatedly affirmed in

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this country, where the English practice of recognizing a lien upon a judgment has been followed. In *Phillips v. Stagg* (2 *Edw. Ch.* 108), the vice-chancellor says that, "the attorney's lien is not to extend beyond the costs in this action. He cannot claim the amount of other costs due to him in other suits at law." In *Adams v. Fox* (40 *Barb.* 442, 448), MORGAN, J., says: "This lien is totally different from the lien upon the papers. The lien on the judgment is confined to the costs of the particular suit, and the attorney can actively enforce it. The lien on the papers is merely a right to retain them, and applies to all his bills of costs." In *St. John v. Diefendorf* (12 *Wend.* 261), the precise question presented in this case was decided adversely to the attorney's lien. Having recovered a judgment, the plaintiff's attorneys there gave notice to the defendant to pay the damages, as well as the costs, to them, on the ground that they had a demand against their client, for costs in other suits, to an amount equal to the damages. The court say: "The question is, whether the attorney has a lien upon his client's money, before it comes into his hands, to satisfy a demand he has against his client for costs in other suits. * * * An attorney has a lien upon his client's *papers*; but he has no lien upon anything which belongs to his client, until it is in his possession. The costs belong to the attorney. * * * There can be no lien upon what belongs to another, without possession," (*Pope v Armstrong*, 3 *Smedes & M.* 214; *Cage v. Wilkinson*, *Id.* 223; *Hektograph Co. v. Feurl*, 11 *Fed. Rep.* 844).

[¶] The petitioner contends that, by the law of this State, as established by the court of appeals in the case of the *Bowling Green Savings Bank v. Todd* (52 *N. Y.* 489, affirming 64 *Barb.* 146), the lien of an attorney for his general balance, which exists upon all papers and vouchers in his possession, is extended equally to any

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judgments recovered or moneys collectible upon them. In that case, a receiver of the plaintiff was appointed after a decree for the foreclosure of a mortgage had been obtained, but before the sale of the premises. The receiver employed Cullen & McGowan, the previous attorneys of the plaintiff, to proceed in the cause, and they afterwards caused the mortgaged premises to be sold, and received the proceeds, from which they claimed to deduct, not only their bill in that action, but also a bill for professional services due to them from the plaintiff in other matters preceding the appointment of the receiver, and also a third bill due to McGowan individually for still prior services. At Special Term, both the last named bills were disallowed. The General Term, on appeal, allowed the prior bill of the firm, but disallowed the individual claim of McGowan ; and this was affirmed by the court of appeals. The court last named say : "The attorneys of the bank had a lien upon the papers in the foreclosure, not only for the costs and charges in that suit, but for any general balance in other professional business ;" referring to 3 *T. R.* 275 ; 8 *East*, 362. Neither of those cases, however, sustains the doctrine of a general lien upon a *judgment* beyond the costs in the particular cause.

[¹] In the court below INGRAHAM, J., says (64 *Barb.* 146, 155) : "Most of the cases in which this lien (upon the judgment) is recognized, are cases where the claim was for costs of that particular action in which the motion was made. But the rule is equally well settled as to any claim which the attorney has for his services, and attaches as well to the proceeds of a judgment as to the papers on which the judgment was founded." No authorities are cited for this last proposition, nor, after much search, have I been able to discover any in this country or in England. We have seen that, so far as respects a general lien upon a judgment or fund in court,

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the authorities are all to the contrary. Where an attorney has collected money for his client, and no rights of third persons have intervened through assignment, death, or bankruptcy, he might doubtless offset his own general bill, (*Patrick v. Hazen*, 10 *Vt.* 184). In the case of the *Bowling Green Savings Bank v. Todd*, *supra*, however, the appointment of a receiver before the collection of the moneys prevented any legal right of set-off. The moneys were collected by the attorneys upon the employment of, and as the attorneys of, the receiver ; as in the case of *Schwartz v. Jenney* (21 *Hun*, 33), the moneys were collected upon the employment, and as the attorneys of the assignee. In neither of these cases does the distinction seem to be noted, which has been so long established, between a mere "retaining lien" upon the papers in the possession of an attorney, which is general but purely passive, and his "charging lien" upon a judgment or fund recovered, which is limited to services in the cause, but capable of being actively enforced.

Numerous prior decisions of the court of appeals have declared, like the English cases, that an attorney's lien upon a judgment is based upon the equitable consideration, that it is by the attorney's labor and skill that the judgment has been recovered; the judgment being within the control of the court, and the parties within its jurisdiction, the court will see that no injustice is done to its own officers.

[³] In *Rooney v. Second Avenue R. R. Co.* (18 *N. Y.* 368), in *Ely v. Cooke* (28 *Id.* 373), in *Dunkin v. Vandenburg* (1 *Paige*, 626), and in many other cases, the attorney has upon this ground been regarded as an equitable assignee of the judgment to the extent of his demands in the cause. Prior to the adoption of the Code of Procedure the extent of this lien was limited to the taxable costs. The Code has made no other change than to extend the lien to any agreed or deserved

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compensation. (*Marshall v. Meech*, 51 N. Y. 140, 143; *Haight v. Holcomb*, 7 Abb. Pr. 210; *Ackerman v. Ackerman*, 14 Id. 229.)

HARRIS, J., in the case of *Rooney v. Second Avenue R. R. Co.*, above cited, says that the attorney is now "to be regarded as the equitable assignee of the judgment to the extent of his claim for services *in the action*." In the same case, COMSTOCK, J., says: "The attorney is entitled to a lien, as against his client, because his labor and skill contributed to the judgment," * * * and he "has an interest in the judgment either to the amount of those costs, or for some other amount, which he is entitled to claim (by agreement or on the *quantum meruit*) as the measure of his compensation."

[⁹] In *Marshall v. Meech* (51 N. Y. 143) the court say, that the "attorney has a lien for his costs and compensation upon the judgment recovered by him. * * * Such a lien existed before the Code, and is not affected by any provision of the Code. The lien exists not only to the extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have as a compensation for his services. To the amount of such lien, the attorney is to be deemed an equitable assignee of the judgment."

[¹⁰] In *Wright v. Wright* (70 N. Y. 100) the court say: "The attorney had a lien for the amount of his costs and *agreed compensation* upon the judgment, and to that extent may be regarded as an equitable assignee of the judgment." See, also, *Ward v. Syme*, 9 How. Pr. 16.

[¹¹] Neither in the decisions, nor in the principles announced in any prior cases, do I find any warrant for holding that an attorney has any lien upon an uncollected judgment beyond his compensation in the particular cause.

[¹²] In the case of *Wolfe v. Lewis* (19 How. U. S. 280),

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a case very closely analogous to that of the *Bowling Green Savings Bank v. Todd*, *supra*, the attorney had obtained a judgment of foreclosure, but the money due was paid into court without sale. Upon the attorney's claims of a general lien for other services, and an order for payment thereof out of the fund by the court below, the supreme court reversed the order and directed the fund to be paid to the complainants.

[¹³] In a recent case (*In the Matter of the Application of Knapp*, 85 N. Y. 284), DANFORTH, J., says: "The lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it" (71 N. Y. 443); thus reaffirming the only ground upon which this lien has ever been put, and which, while it explains the reason for the lien, also necessarily limits it to the services and charges in the same action. In the case last cited, the same eminent justice adds: "No new rule was enunciated in *Bowling Green Savings Bank v. Todd* (52 N. Y. 489), where it was said that the lien of the attorney attaches to the money recovered or collected upon the judgment."

[¹⁴] As the prior rule was undoubted, that the lien upon the judgment did not extend beyond the costs and compensation in the cause, or in the same subject-matter, and as no new rule was intended to be enunciated in the case of *Bowling Green Savings Bank v. Todd*, *supra*, it must be understood that the court of appeals did not intend in that case to overrule so many express adjudications, that where the moneys have not been reduced to the attorney's actual possession, his lien upon the judgment does not extend beyond the amount of compensation due to him in the particular cause, or in the same subject-matter. *In re Paschal*, 10 Wall. 496; *General Share Trust Co. v. Chapman*, L. R., 1 C. P. Div. 771.

In the present case, the petitioner never came into

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possession of the moneys claimed ; they were procured by the services of other attorneys, by legal proceedings subsequent to the date of the petitioner's claim. These subsequent services were necessary to realize anything upon the judgment, and the subsequent attorneys have their own lien upon the judgment and its proceeds for their subsequent services in the cause ; and, upon the doctrine contended for by the petitioner, they might have a conflicting lien for their own general balance, to the full amount collected, if their bill amounted to so much. Were the doctrine to be recognized, that attorneys have a general lien for all their professional services upon each and every uncollected judgment, which they might have obtained in behalf of a client, through an indefinite period, very great confusion and inconvenience would be the necessary result. The petitioner's general bill in this case, exceeded each of the judgments against James Wilson. If one of them only had been collected by the subsequent attorneys, the prior equitable assignment to the petitioner, upon the doctrine contended for, would either have entitled him to the entire proceeds, to the exclusion of the subsequent attorneys, who might have had greater equitable claims for their services in obtaining the money upon the judgment, or else would compel a further judicial hearing and determination, as between the former and subsequent attorneys, as to the apportionment of the proceeds between them.

The bill of services which the petitioner now seeks to charge upon the two earlier judgments is, moreover, a bill for obtaining judgment against Hine and Phillips some four months afterward. How much, if any, of this bill, existed in January, 1879, when the judgments against Wilson were recovered, does not appear ; and by the rule that formerly existed, the attorney had no lien, except upon papers in his hands, until judgment; or, at least, till a verdict. (*Sweet v. Bartlett*, 4 *Sands*.,

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661; McCabe *v.* Fogg, 60 *How. Pr.*, 488.). This latter bill, as it now stands, could not, therefore, have been a lien upon the prior Wilson judgments when they were entered; and if not a lien then, how could it become [15] so afterward? Neither principle nor authority can sanction an increase in the amount of a lien upon an uncollected judgment through subsequent services in [16] independent matters. Section 66 of the new Code of Procedure, 1879, which gives an attorney "a lien upon his client's cause of action" from its commencement, refers, I think, to his services and charges in the cause itself and no more, and does not affect the questions here considered.

The petitioner's claim to a lien upon the judgments against Wilson must therefore be disallowed.

Upon the pending suits transferred by the petitioner under the agreement, the assignee has collected \$144.57. The petitioner had a lien upon these suits and on the papers therein for his general bill, which the agreement has preserved. Those papers were essential to the further prosecution of these suits, and to the recovery of the moneys afterward collected therein. Upon the authorities above cited (*In re Paschal*, 10 *Wall.* 483; In the Matter of Broomhead, 5 *Dowl. & L.* 52, etc., *supra*), the court would not have ordered those papers to be transferred by the petitioner, except upon payment of his general bill, or some security analogous to that of the agreement made, (Carver's case, 7 *Nott. & H.* 499; *Heslop v. Metcalf*, 3 *Myl. & C.* 183; *Cane v. Martin*, 2 *Bear.* 584; *Hektograph Co. v. Fourni*, 11 *Fed. Rep.* 844). By that agreement, this lien must be paid "out of the first moneys collected from those suits." I find a balance of \$74.55 collected upon these suits not applied to the petitioner's benefit, and he is therefore entitled to that amount.

The substitution of attorneys upon the Wilson execu-

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tions, and the surrender of the notes upon which those judgments were founded, were not necessary, and were of no value in the subsequent collection of those judgments ; they were not even clearly embraced in the terms of the agreement between the parties ; and, as they were of no beneficial use, the surrender of them cannot now serve as a basis for any claim to a general lien upon the Wilson judgments, which did not previously exist.

In Hodgkinson *v.* Kelly (1 *Hogan*, 388), the court say : "The general lien exists as to the papers and deeds in his (the attorney's) hands, but cannot be extended to the funds in the cause, if the plaintiff can obtain payment without his assistance or the use of those papers."

The petitioner may have an order for the payment of \$74.55, and his disbursements in this proceeding.

KIPP, RESPONDENT, *v.* MCLEAN, APPELLANT.

N. Y. COMMON PLEAS, GENERAL TERM; MAY, 1882.

§§ 481, 942.

Pleading foreign statute.—What is a sufficient pleading of.

The statutes of another State are sufficiently pleaded when the acts done in pursuance thereof, and the liability arisen thereunder, are averred to be according to certain sections of the laws of that State, which are set forth by numbers, dates of passage, and titles.*

(VAN BRUNT, J., dissenting.)

(Decided June 5, 1882.)

Appeal by defendant from a judgment of the general term of the marine court, affirming a judgment entered upon a verdict.

* See note on pleading and proof of foreign statute, following this case.

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The plaintiff's assignor, one Post, conveyed to the defendant by deed certain premises situate in Jersey City, N. J., and in such deed the defendant covenanted to pay the taxes imposed upon the property for the year 1877. The defendant having neglected to pay such taxes they were paid by said Post, and this action was brought to recover the amount thereof.

The complaint alleged: "That according to sections 129, 137, 138, 139, 141, 150 and 152 of chapter 424 of the Laws of 1871 of the State of New Jersey (page 1094, etc.), passed March 31st, 1871, entitled 'An act to reorganize the local government of Jersey City,' and chapter 111 of the Laws of 1877 of New Jersey (page 169), entitled 'An act to provide ways and means to defray the State expenditures,' approved March 9th, 1877, the said taxes were duly assessed upon said premises in the name of said Post, who thereby became personally liable for the payment of the same."

That according to sections 151, etc., of said chapter 424 of the Laws of 1871, and certain sections of various other laws set forth in the same manner, "and sections 2 and 3 of chapter 176 of the Laws of 1854 of the State of New Jersey, approved March 17th, 1854, entitled 'An act to make taxes a lien on real estate and to authorize sale for payment of the same,' being sections 114 and 115 of the Revised Statutes of the State of New Jersey (Revision of 1709 to 1877), page 1163," and certain sections of various other laws set forth in the same manner, "said taxes at the time they were paid as stated in this complaint, were a first lien upon said premises, and said property was liable to be sold for payment of the same."

That according to certain sections of various other laws set forth in the same manner, "said Post paid said taxes to the city collector of Jersey City, N. J., the person authorized by said laws to receive the same,

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which payment discharged said taxes and said liens on said premises."

"That at the time said taxes were paid as stated herein, the same were due and payable, and said Post was liable on certain unpaid bonds and mortgages on said premises, and in order to protect said bonds and mortgages and said property, was compelled to, and did, pay said taxes."

At the trial, the defendant objected to the admission of the statutes of New Jersey, on the ground that they had not been sufficiently pleaded, and his objection was overruled.

H. B. Kinghorn, for appellant.

Nelson Zabriskie, for respondent.

By the Court.—DALY, Ch. J.—The plaintiff avers, that according to certain sections, which are specified, of certain statutes of the State of New Jersey, the titles of which and the dates of the passage of which are averred, a tax for the year 1877, to the amount of \$57.06, was duly assessed upon certain premises in Jersey City, in that State, in the name of Abraham Post, who, it is averred, conveyed the said premises by a deed in which the defendant covenanted to pay the said taxes; that he did not pay them as he had agreed to do, and that Post, he being liable on certain unpaid bonds and mortgages on said premises, paid the said tax. That according to certain specified sections of statutes of said State, the dates of the passage of which, and the titles of which are averred, the said tax, when paid by Post, was a first lien upon said premises, and the property was liable to be sold for the payment of it.

This is substantially averring, that under and in pursuance of certain sections of certain statutes of the State of New Jersey, a tax was imposed upon the premises,

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which was a first lien upon them ; and that they were liable to be sold for the payment of it, which, I think, for the purposes of pleading, ought to be regarded as sufficient, *Barclay v. The Quicksilver Mining Co.*, 6 *Lans.* 25, 32 ; *The People v. Ryder*, 12 *N. Y.* 433, 436, 437, 438. And as far as respects the other questions raised by the appellant, I see no ground for reversing the judgment, and am of the opinion that it should be affirmed.

BEACH, J., concurred.

VAN BRUNT, J. (dissenting). — The only question which it is necessary to consider upon this appeal is, whether or not the plaintiff's complaint contains a sufficient averment of the statutes of the State of New Jersey, in order to entitle him to offer evidence of such statutes. His allegation is, that according to sections 129, &c., of chapter 424 of the Laws of 1871 of the State of New Jersey, passed March 31, 1871, entitled, "An act to organize the local government of Jersey City," and chapter 111 of the Laws of 1877 of New Jersey, page 169, entitled, "An act to provide ways and means to defray the State expenditures," approved March 9, 1877, the said taxes were duly assessed upon said premises in the name of said Post, who thereby became personally liable for the payment of the same.

Under an objection, the court admitted the statutes in question in evidence. This seems to have been error.

As early as the case of *Holmes v. Broughton* (10 *Wend.* 75), the rule was laid down that a party seeking the benefit of the statute of another State, must set forth the statute, so that the court might see that the proceedings had been conformable thereto, and that an averment that the proceedings were according to the laws of the State and fully authorized thereby, was not sufficient.

The same rule was laid down in the case of *Throop v. Hatch* (3 *Abb.* 23). It is there held, that in a complaint

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upon a cause of action dependent upon the laws of other States, a general averment is insufficient; the law relied upon must be averred and proved. Other cases to the same effect might be cited, but it seems to be unnecessary.

Our attention is called to the decision in the case of *Barclay v. The Quicksilver Mining Company* (6 *Lans.* 25), as being in conflict with the foregoing rule; but an examination of that case shows, that it is in entire harmony with the previous decisions. The allegations of the complaint in that case showed precisely what had been done by the plaintiff, in order to acquire title to the claim in question, and that those allegations were followed by the averment that those proceedings were in pursuance of, and in conformity with, the laws of Pennsylvania. The court held that that was, in effect, an averment of the legal effect of the statute of Pennsylvania, without setting them forth at length.

In the case at bar, there is no allegation whatever of any of the proceedings which it is claimed were taken according to the laws of New Jersey, nor is there any allegation that these proceedings were in accordance with such laws, which seems to be a very substantial distinction between the case at bar and the case of *Barclay v. The Quicksilver Mining Company*. There was, therefore, no sufficient allegation contained in the complaint, which would justify the admission of the statutes in question. There was a bare allegation that certain laws entitled in a certain way were passed upon a certain date ; there was no allegation of the legal effect of those statutes, nor that they had been taken pursuant to the statutes of New Jersey.

The judgment of the general term of the marine court must, therefore, be reversed, and a new trial ordered, with costs to abide the event.

NOTE.—The completion of the note upon pleading and proof of foreign laws, which should have followed this case, has been unavoidably delayed. The note will appear in the appendix to this volume.

Mayor *v.* Mayor.

**MAYOR, APPELLANT, *v.* MAYOR ET AL.,
RESPONDENTS.**

COURT OF APPEALS ; OCTOBER, 1882.

§§ 484, 817, 982.

Consolidation of actions.— Cannot be had in partition, where lands situate in different counties, and defendants in both actions are not the same.—

When permitted by Code.— Actions for partition of lands, situate in different counties, cannot be joined.

Where the plaintiff brought two separate actions for the partition of lands situate in different counties, and some of the defendants had an interest only in the land situate in one county, and were not defendants in the other action,— *Held*, that the court had no power to order the consolidation of the actions.*

Section 817 of the Code permits the consolidation of actions, only where they are pending between the same parties, plaintiff and defendant, and for causes of action capable of being joined, which is not the case in actions for the partition of real property situate in different counties.

(Decided October 27, 1882.)

Appeal by plaintiff from an order of the general term, supreme court, second department, affirming an order of the special term, directing the consolidation of actions for partition.

The plaintiff, as a devisee under the last will and testament of one Pierre A. Mayor, deceased, brought an action in the supreme court, Kings county, for the partition of certain land situate in that county; and the defendants in the action were Annie E. Miner, another devisee under the said will, the executors thereof, and the wife of the plaintiff.

The plaintiff, as such devisee, also brought an action in the supreme court, New York county, for the partition of land situate in that county, of which the decedent was seized and possessed as a tenant in common

* See Note on Consolidation of Actions, following this case.

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with one George Lane ; and the same persons who were defendants in the first described action were made defendants in this action, and, also, the said Lane and his wife, and the complaint alleged that the plaintiff owned no other lands in the State, in common with the defendant Lane.

The plaintiff, as such devisee, also brought an action in the supreme court, New York county, against the executors of said will, for an accounting.

The executors moved, in Kings county, for an order consolidating the three actions, and the special term granted the motion as to the actions for partition, but denied it as to the action for an accounting.

Abram Kling (*Edmond Huerstel*, attorney), for appellant :

An action for partition is a local action ; and, under section 982 of the Code, must be tried in the county wherein the land, the subject of the action, or some part thereof, is situate, *Bush v. Treadwell*, 11 Abb., N. S., 27; *Birmingham Iron Foundry v. Hatfield*, 43 N. Y. 224; *Leland v. Hathorn*, 42 Id. 547; *Gould v. Bennett*, 59 Id. 124; *Wood v. Hollester*, 3 Abb. 14.

Even if the court had power, under section 987, to change the place of trial, it could not be done unless an impartial trial could not be had in the proper county, or the convenience of witnesses, or the ends of justice, would be subserved by such change, which is not the present case.

The defendants Lane and his wife have no interest in the lands situate in Kings county, and their interest in such lands could not be described in the complaint, as required by section 1542; and as by section 1543, if they were made defendants in such action, they might controvert the interest of any other defendant, and endless litigation and confusion would ensue..

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Section 817 provides for the consolidation of actions only where they are between the same parties, plaintiff and defendant, and for causes of action which might have been joined. These actions are not against the same defendants.

In their nature, these actions are *in rem* against different pieces of property, and there is no reason why each piece should not bear its own burden in the way of costs, and as the rights of these defendants differ, if the actions are consolidated, the defendants in one action would be compelled to bear the burden which properly belongs to the defendants in another, *Kipp v. Delamater*, 58 *Hou.* 183; *Beach v. Ruggles*, 6 *Abb.*, N. C., 69.

A. Simis, Jr. (David Barnett, attorney), for respondents:

Urged that, as the consolidation of actions was, by section 817, discretionary, no appeal would lie to the court of appeals from such an order, under subdivision 2 of section 190; that the rights of all parties could be adjusted in one action, without injustice to any interest, and the order was properly made to prevent unnecessary litigation.

FINCH, J.—The order of consolidation must be reversed, because the special term had no power to make it. The authority to consolidate actions is given by section 817 of the Code, and permits it only where both actions are pending between the same plaintiff and the defendants, for causes of action which might have been joined. That is not the case here. The actions were for partition. The subject of one action was land in the city and county of New York, and the other, land in the county of Kings, and two of the defendants, Lane and wife, in the New York action, were not parties to the Kings county action, and had no interest in

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the subject of the latter action. By the consolidation, they are exposed to the possible costs and expenses and the delays of a litigation in another county, in which they have no interest. In such a case, the consolidation does not consolidate. The two actions remain two and cannot become one. All that is effected is an improper change of the place of trial from New York to Kings, and a concurrent trial of two actions, having neither the parties nor the same subject of action. The Code does not authorize such a proceeding.

The order of the general term and of the special term should be reversed, with costs.

All concurred, except RAPALLO, J., absent.

NOTE ON CONSOLIDATION OF ACTIONS.

CODE PROVISIONS. CONSOLIDATION RULE. OBJECT OF CONSOLIDATION. EFFECT OF CONSOLIDATION. PRACTICE NOT CHANGED. DISCRETIONARY. BY WHOM MOTION MAY BE MADE. WHEN MOTION SHOULD BE MADE. WHAT MUST APPAR. MERITS. ACTIONS BROUGHT AT DIFFERENT TIMES. COSTS. ADJOURNMENTS. ESTOPPEL. EXTENSION OF TIME TO PLEAD. EVIDENCE. JUDGMENT.

IN PARTICULAR CASES.

Arrest. Attorney's Charges. Bonds. Equitable Actions. Foreclosure. Justices' Courts. Insurance. Libel. Mechanics' Liens. Partition. Penal Actions. Promissory Notes and Bills of Exchange. Slander.

QUASI CONSOLIDATION.

Actions divisible into Classes. Actions for Misapplication of Money. Bonds. Courts of Equal Rank. Ejectment. Guarantees. Injunction. Issues of Law. Slander. Appeal. Defendant Proceeded against in Different Characters. Stipulation. Equitable Actions.

REMOVAL OF ACTIONS FOR CONSOLIDATION.

McKay v. Reed, Reported.

CONSOLIDATION IN COURTS OF EQUAL RANK.

CODE PROVISIONS.—The provisions of the Code regulating the consolidation of actions, in general, are §§ 817, 818, 819, which were taken from §§ 36, 37, 38 of 2 R. S. 383. Except a difference in phraseology and the addition of the words "any or all of them," found in § 817, and the

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words "and for the same cause of action" found in § 819, these provisions of the Code are the same as those of the *R. S.*

Section 86 of the *R. S.* was taken from Chap. 259, § 7 of the Laws of 1818; § 87 was added by the Revisers (see *Revisers' Report* made Jan. 2, 1828, vol. v.); and § 88 was taken from 1 *R. L.* (1818) 521, § 14, which was, in turn, taken from 1 *Kent & Radcliff's Revision* (1801, 2 ed.) 354, § 14.

Section 817 of the Code provides: "Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action."

Section 818 provides: "Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court."

Section 819 provides: "Where separate actions are commenced against two or more joint and several debtors, in the same court, and for the same cause of action, the plaintiff may, in any stage of the proceedings, consolidate them into one action."

Subd. 6 of section 8347 makes sections 817 to 818, both inclusive, applicable to all courts of record.

Section 1989 provides for the consolidation of two or more actions brought by the people, upon the same mortgage or other contract, against separate defendants, claiming or defending under the same title. The attorney-general must, upon the request of such defendants, cause the actions to be consolidated into one; and only one bill of costs can be taxed against the defendants.

Section 2728 provides for the consolidation, in a surrogate's court, of a special proceeding brought by an executor or administrator for the judicial settlement of his accounts, with a special proceeding brought by a beneficiary to compel an executor or administrator to render and settle his account.

Section 2809 makes section 2728 applicable to the settlement of the account of a testamentary trustee.

CONSOLIDATION RULE.—Under the old English system of individual insurance, different underwriters bound themselves severally, each for the amount of his separate subscription; and, in case of loss, the insured could not bring a joint action upon the same policy against all of the underwriters, but was compelled to sue each separately. The insured might proceed to try all of the actions though the issues were the same, and thus subject each of the defendants to a bill of costs. Such actions could not be consolidated without the consent of the plaintiff, even though the defendants should stipulate to abide the event of the trial of such action as the plaintiff should select. — *v. Glover, 2 Barnardiston*, 103, decided in 1781.

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But the underwriters might seek relief in equity, and an injunction would be granted to stay proceedings in all of the actions, except one, upon the defendants; in the remaining actions, undertaking to pay the amount of their subscriptions in event of the plaintiff's recovery in the action tried at law. Such resort to equity having been found little less expensive than defending the several actions, it was one of the first acts of Lord MANSFIELD, upon ascending the bench (1756), to seek a remedy for this evil; and he urged upon suitors that it would be for their common advantage to confine the litigation to a court of law. He proposed, that upon the plaintiff's consenting to bring only one of the actions to trial, thus saving the defendants from the expense of separate defenses and a possible bill of costs in each case, the defendants should agree to produce all books and papers material to the issue, thus saving the plaintiff a possible resort to a bill of discovery in equity, and its attendant delay and expense, and that the defendants should also undertake not to resort to equity, nor to bring a writ of error, and abide the event of the action tried. This proposition proved to be acceptable, and was acted upon; and the practice was found to work so beneficially, and to be so much for the interests of both parties, that it grew into general use under the name of the "consolidation rule." *Park on Marine Ins.* (8th ed.) Introduction xci; *Marshall on Marine Ins.* (5th ed.), 550.

But it is error to suppose that "consolidation" was unknown before the time of Lord MANSFIELD (see *Grimstone v. Burges*, 1 *Barnes' Pr.* 121, decided in 1735; *Bayly v. Raby*, 1 *Stra.* 420, decided 1721; *Catlin v. Elliott*, 1 *Barnes' Pr.* 252, decided 1733; *Harper v. Woodhouse*, *C. P. Prac. Reg.* 151, decided 1733), and it seems that the "consolidation rule" was, in its effect, but the extension of a principle already recognized. That principle, as applied to the consolidation of actions at law, may be regarded as the exercise, by a court of law, of a species of equity power somewhat analogous to an injunction in equity to prevent a multiplicity of actions. *Kerr's Actions at Law*, 29, 215 (*65 Law Library, N. S.*, 29, 150). The "consolidation rule" as thus established, seems not to have been compulsory (1 *Tidd's Pr.* [9th ed.] 615; *Caines' Pr.* 184; *Church v. Clason*, *Col. & Cai. Cas.* 68; *S. C.*, 1 *Johns. Cas.* 29; 2 *Arch. Pr.* 180; *Park on Ins.*, *supra*; *Marshall on Ins.*, *supra*), and to have had reference only to actions upon policies of insurance, where the liability of the defendants was several and the causes of action could not have been joined in one declaration, and where the defendants were different in each action, while their interests were identical, and the causes of action substantially the same. But, although there is some conflict among the earlier English cases, it seems, that "consolidation" was a compulsory proceeding against the plaintiff, and the requirements, in general, were that the actions should be between the same parties and for causes of action which might have been joined in one declaration; and, indeed, in some of the old works upon

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practice, the proceeding is described as "consolidating declarations." *2 Sellon's Pr.* 148; *Bayly v. Raby*, 1 *Stra.* 420; *Smith v. Crabb*, 2 *Id.* 1149; *Swithin v. Vincent*, 2 *Wils.* 227.

The original difference between "consolidation" and the "consolidation rule" (and also a third variety of the proceeding hereinafter described as "quasi consolidation"), does not seem to have been, at all times, very closely observed (*Lee v. Board of Township, &c.*, 42 *N. J. L.* 548; *Den ex dem. Smith v. Fen*, 9 *N. J. L.* 395; *3 Chitty's Gen. Pr.* 642; *Wilson's Judicature Acts* [3d ed.], 393); and the terms have sometimes been used as convertible, and the proceedings regarded as identical or nearly identical, and both included in the "consolidation rule." See *Brown's L. Dic.* Title "Consolidation Rule;" *Bouvier's L. Dic.* Title "Consolidation Rule;" *Tomlin's L. Dic.* Title "Consolidation;" *Sharp v. Lethbridge*, 4 *M. & G.* 87; *Thompson v. Shepherd*, 9 *Johns.* 262; *Brewster v. Stewart*, 3 *Wend.* 441. In the comprehensive use of the term, the "consolidation rule" was adopted in this State before the act of 1818 (*Church v. Carson, Col. & Cai. Cas.* 68, decided 1779; *S. C.*, 1 *Johns. Cas.* 29; *Waterbury v. Delafield*, 1 *Cai.* 513, decided 1804; *Camman v. N. Y. Life Ins. Co.*, 1 *Cai.* 114, decided 1803; *Thompson v. Shepherd, supra*, decided in 1812); but not to the extent of the English "consolidation," when it did not appear that the same defense was intended in each of the actions. *Thompson v. Shepherd, supra*, and see *Brewster v. Stewart, supra*.

OBJECT OF CONSOLIDATION.—The object of consolidation is to prevent oppression, to prevent oppression by the unnecessary accumulation of costs, to prevent a multiplicity of actions and for convenience in the disposition of the actions. *Thompson v. Shepherd*, 9 *Johns.* 262; *Brewster v. Stewart*, 3 *Wend.* 441; *Blake v. Michigan, &c.*, R. R. Co., 17 *How.* 228; *Third Ave. R. R. Co. v. The Mayor*, 54 *N. Y.* 159; *Den ex dem. Smith v. Fen*, 9 *N. J. L.* 395; *Lee v. Board of Township, &c.*, 42 *N. J. L.* 548; *Cecil v. Briggs*, 2 *Term. R.* 639; *Logan v. Mechanics' Bank*, 18 *Ga.* 201; *Worthy v. Administrators of Chalk*, 10 *Rich. (S. C.)* 141, 148; *Kerr's Actions at L.* 215 [65 *Law Library, N. S.*, 150]; *Wolverton v. Lacey*, 8 *Monthly L. Rep.*, *N. S.*, 672; *Scott v. Brown*, 1 *Nott & McC.* 447, note; *Phillips v. Delane*, 2 *Brev.* 429; *Benton v. Praed*, 1 *Smith*, 423.

EFFECT OF CONSOLIDATION.—By consolidation the other actions are discontinued, and only the consolidated action remains. *Blake v. Michigan*, etc., R. R. Co., 17 *How.* 228. But see *Earl v. Lefferts*, 1 *Johns. Cas.* 395; *S. C., Col. & Cai. Cas.* 102 (decided in 1800).

When the actions have been consolidated, the court considers the whole as but one action in effect. *Caines' Pr.* 186.

There should be but one trial, and only one judgment entered. *Davis v. Smith*, MS. case cited, *Holmes & Disb. Pr.* 275; and see *Oldershaw v. Tregwell*, 8 *Car. & P.* 58.

"To consolidate means something more than re-arrange or re-divide.

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'In a general sense it means to unite into one mass or body, as to consolidate the forces of an army, or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate two bills is to combine them into one.' Such is Mr. Webster's definition of the word." Ind. Dist. of Fairview *v.* Durland, 45 *Iowa*, 53.

Where two actions have been consolidated they constitute thereafter but one action. Castro *v.* Whitlock, 15 *Tex.* 487.

Any or all of the actions may be consolidated by the court (§ 817); and it seems that the extent of the consolidation must depend upon circumstances. Syers *v.* Pickersgill, 27 *L. J. Exch.* 5.

It seems, that where the effect of the consolidation would be to make the aggregate demand exceed the jurisdiction of the court, the motion should not be granted. Manufacturers' Bank *v.* Goolsby, 35 *Ga.* 82; Parrott *v.* Green, 1 *McCord*, 534; Planter's &c. Bank *v.* Cowing, 2 *Nott & M'C.* 488; Martin *v.* Chauvin, 7 *Mo.* 277; but see Phillips *v.* Delane, 2 *Brev.* 489; Scott *v.* Brown, 1 *Nott & M'C.* 417, *note*.

PRACTICE NOT CHANGED.—The Code of Procedure did not change the practice in regard to the consolidation of actions (Morris *v.* Knox, 6 *Abb.* 828, *note*), nor has it been changed by the Code of Civil Procedure (§ 817), Bech *v.* Ruggles, 8 *Abb.*, N. C., 69; Lockwood *v.* Fox, 8 *Daly*, 127; Campbell, &c., Co. *v.* Lyddy, 1 *Civ. Pro. R.* (1 *McCarty*), 364.

DISCRETIONARY.—The order for consolidation is discretionary, *Code of Civ. Pro.* § 817; Wilkinson *v.* Johnson, 4 *Hill*, 47; Brewster *v.* Stewart, 3 *Wend.* 441; Crane *v.* Kehler, 6 *Abb.* 328, *note*; Eleventh Ward Savings Bank *v.* Hay, 8 *Daly*, 828; S. C., 55 *How.* 438. When saying that the order is discretionary, it should be understood that it can be granted only when the application is brought within the provisions of the Code, Mayor *v.* Mayor, *supra*.

Consolidation is not a matter of strict right, nor is it the proper subject of any plea, either in bar or in abatement. M'Rae *v.* Boast, 3 *Rand.* (Va.) 481.

BY WHOM MOTION MAY BE MADE.—A motion for the consolidation of actions, under sections 817, 818 of the Code, as the substitutes of 2 *R. S.* 388, sections 87, 88, may be made by the plaintiff as well as by the defendant. Briggs *v.* Gaunt, 4 *Duer*, 684; S. C., less fully, 2 *Abb.* 77.

It seems to be conceded that, under the English practice, both at common law and under the judicature acts, the motion for consolidation must be made by the defendant. Amos *v.* Chadwick, 4 *L. R. Chanc. Div.* 869; Wilson's *Judicature Acts* (8d ed.), 395; Chitty's *Forms of Pract. Proc.* 11th ed.), 223; Lush's *Pr.* 564. The reason for thus limiting the right to move, at least in cases where both causes of action had accrued at such a time that they might, without delay to the plaintiff, have been united in one declaration, appears to be, that the plaintiff, having had it within his power, in the first instance, to unite the causes of action, and having

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elected to bring separate actions, cannot afterward make another election and consolidate the action, and so be heard to complain of his own act. *Groff v. Musser*, 2 *Ser. & R.* 262. In *Briggs v. Gaunt*, *supra*, the second cause of action had not accrued when the first action was brought, and, therefore, the plaintiff, the moving party, could not, in the first instance, have united it with that of the first action, and the consolidation was proper. But an examination of *Briggs v. Gaunt* will show that, although the construction of the statute (2 *R. S.* 388, § 86), was directly involved, and it was held that a motion to consolidate might be made as well by the plaintiff as by the defendant, the case does not go to the extent of holding, that under all circumstances it would be proper to grant the motion when made by the plaintiff. An objection such as suggested above, while not being an obstacle under our practice to the plaintiff's moving, might, perhaps, be deemed sufficient to justify a denial of the motion, when opposed by the defendant. But it would seem that the provisions of the Code (§§ 817, 818), were broad enough, in a proper case, to permit the court, of its own motion, to order a consolidation.

Under the terms of section 819, it seems that in actions brought against joint and several debtors, in the same court, for the same cause of action, only the plaintiff can have the consolidation. See 2 *Wait's Pr.* 258; *Briggs v. Gaunt*, 4 *Duer*, 664, 666.

WHEN MOTION SHOULD BE MADE.—A motion for consolidation must be made before the actions are brought on for trial. *Eleventh Ward Savings Bank v. Hay*, 8 *Daly*, 828, S. C., 55 *How.* 788, affirmed, 73 *N. Y.* 609, and see *Jackson ex dem. Pionier v. Schaeber*, 4 *Cov.* 78.

By plaintiff, should not be made until after defendants have answered. *Le Roy v. Bedell*, 1 *Code R.*, N. S. 201.

When defendants have answered, and the plaintiff subsequently serves an amended complaint, the defendants should not move for consolidation until the time to answer the amended complaint has expired, unless they show the nature of the defense to the amended complaint. *Le Roy v. Bedell*, *supra*.

Defendant may plead before making the motion. *Jenkins v. Bloodgood*, 23 *Wend.* 645.

Where the plaintiff sues out a writ against one defendant, and afterwards discovers that there is another, a partner of the first defendant, against whom he takes out a writ to answer *simul cum*, the plaintiff should move to consolidate the actions, for if he do not, he cannot, after a plea in abatement to a separate declaration, apply to amend his declaration by adding the other defendant. *Caines' Pr.* 184, citing MS. case of *Shute v. James* (decided in 1801); and see *Smith v. Woodward*, 1 *Cranch C. C.* 226.

WHAT MUST APPEAR.—The moving papers must show that the same question or questions are to be litigated in each action, and where the motion is made by the defendant, the nature of the defense must be dis-

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closed, although a defense on the merits is sworn to in each action. *Wilkinson v. Johnson*, 4 *Hill*, 46.

It is not enough for the defendant to show that the causes of action in the different suits are such as might be joined; it must appear in addition, that no defense is intended in any of the actions, or that the questions which will arise are substantially the same. *Wilkinson v. Johnson*, *supra*.

It is not sufficient for the moving affidavits to merely state that the defenses in each action will be substantially the same. It should appear, that the questions to be tried will be substantially the same in all of the actions. *Dunn v. Mason*, 7 *Hill*, 154.

That the defense in each action is substantially the same, is not enough. The nature of the defense should be disclosed, that the court may determine whether the questions are such as can properly be disposed of at one trial. The questions to be tried must be substantially the same. *Crane v. Koehler*, 6 *Abb.* 328, *note*; *Gerding v. Anderson*, 64 *Ga.* 304.

The inquiry is, whether the questions to be tried are substantially the same, and the defenses identical. *Morris v. Knox*, 6 *Abb.* 328, *note*.

It should be shown, that the causes of action are such as might be joined in the same complaint, and that the questions which will arise in both actions are substantially the same; and, either that no defense is intended, or that the defense will be substantially the same in both actions. If these matters are not controverted, and it does not appear that any great delay will ensue from the consolidation, or that it will be prejudicial to the rights of the other party, the motion will be granted. *Dunning v. Bank of Auburn*, 19 *Wend.* 28.

It seems that it is not a case for the consolidation of two actions, where there is a defense in only one. *Wilkinson v. Johnson*, 4 *Hill*, 46.

The rule that on moving for a consolidation it must affirmatively appear, that no defense is intended in any of the actions, or that the questions which will arise in them are substantially the same, applies to section 817 of the Code. *Campbell Printing, etc., Co. v. Lyddy*, 1 *Cit. Pro. R.* (1 *McCarty*), 364.

Where the second cause of action had not accrued when the first action was brought, and the defendant moved for the consolidation of the actions on the ground that the questions which would arise in both were the same, but it did not appear that there was to be any defense, and the effect of the consolidation would have been to delay the first action, although there was no defense in that action, the motion was denied. But if the defendant had shown that he intended to suffer judgment to be taken by default in both actions, or if he had offered to take such steps as would have avoided the delay, which the consolidation would otherwise occasion, the motion might have been granted. *Pierce v. Lyon*, 8 *Hill*, 450; and see *Morris v. Knox*, 6 *Abb.* 328, *note*. But where

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the causes of action accrued at different times, and the motion to consolidate is made by the plaintiff, and would be the occasion of delay to him only, the defendant has no right to complain of such delay, to which the plaintiff is willing to submit. *Briggs v. Gaunt*, 4 *Duer*, 604, 607.

Where the moving affidavit for a consolidation was made by the defendant's attorney, and it set forth that he was informed by the president of the defendant that there was a good defense, and that the questions were the same in each action, but no excuse was given why the affidavit was not made by such president, INGRAHAM, J., denied the motion. *Hone v. Farmers' Bank of Ohio*, MS. case cited, *Voorhies' Code* (10th ed.), 259 *note c.*

The parties must be the same in each action. *Code of Civ. Pro.* § 817; *Cooper v. Weed*, 2 *How.* 40; *Mayor v. Mayor*, *supra*.

The causes of action must be such as might be joined in one complaint. Section 817; *Wilkinson v. Johnson*, 4 *Hill*, 46; *Dunning v. Bank of Auburn*, 19 *Wend.* 23; *Mayor v. Mayor*, *supra*; *Blesch v. Chicago, &c., R. R. Co.*, 44 *Wis.* 593. As to what causes of action may be joined in one complaint, see section 484.

MERITS.—It is not necessary that a defense on the merits should be shown to entitle a defendant to an order for consolidation, and an affidavit of merits is not necessary. *Brewster v. Stewart*, 3 *Wend.* 441, 442.

But to save a default in pleading, on a motion for consolidation, such an affidavit is necessary. *Jenkins v. Bloodgood*, 23 *Wend.* 645; see "Extension of Time to Plead."

ACTIONS BROUGHT AT DIFFERENT TIMES.—Consolidation may be granted, not only when the actions are brought at the same time, but when they were brought at different times; and it is not a sufficient objection to granting the motion that the second cause of action had not accrued at the time when the first action was brought. *Dunning v. Bank of Auburn*, 19 *Wend.* 23; *Oldershaw v. Tregwell*, 3 *Car. & Payne*, 58; and see *Brewster v. Stewart*, 3 *Wend.* 441; *Briggs v. Gaunt*, 604, 607.

COSTS.—In *Ferris v. Betts* (2 *How.* 78), it was said that no costs would be allowed on granting a motion for consolidation. But as the weight of decisions is to the contrary, and as costs are allowed so frequently in practice, this case cannot be regarded as an authority.

When all the demands might have been embraced in one action, and consolidation is ordered on motion of the defendant, costs will be awarded to him, unless a satisfactory reason is shown by the plaintiff for bringing more than one action. *Bank of U. S. v. Strong*, 9 *Wend.* 451; and see *Anon*, 1 *Chitty R.* 709, *note*; *Cecil v. Briggs*, 2 *Term. R.* 639.

The plaintiff will be ordered to pay the costs of the motion, when both of the actions were commenced at the same time, or under circumstances which evince a disposition to make the actions burdensome to the defendant. In other cases, if the plaintiff, without reasonable grounds for

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objection, refuse to consent to a consolidation, after a request, he will be required to pay the costs of the motion. *Dunning v. Bank of Auburn*, 19 *Wend.* 28.

Unless under circumstances justifying it, special provision is made in the order for consolidation, saving the costs already incurred in the actions discontinued by the consolidation, such costs are lost so as not to be taxable in the consolidated action. *Blake v. Michigan, etc.*, R. R. Co., 17 *How.* 228; and see *Simpson v. Caulkins*, 1 *Abb. Adm.* 539, 544; but see, under the old practice, *Earl v. Lefferts*, 1 *Johns. Cas.* 395; S. C., *Col. & C. Cas.* 102.

For an instance of the imposition of costs of the action, already accrued, and motion costs, upon granting an order for consolidation, on motion of plaintiff, see *Briggs v. Gaunt*, 4 *Duer*, 664; S. C., 2 *Abb.* 77.

ADJOURNMENTS.—Where the plaintiff refuses in a proper case to enter into a consolidation rule, he will be entitled to no indulgence; but the defendants may have imparlances until one of the actions shall have been tried as a test. *Church v. Clason*, *Col. & Cai. Cas.* 62; S. C., 1 *Johns. Cas.* 29; *Caines' Pr.* 183; 1 *Tidd's Pr.* (9th ed.), 615; and see *Amos v. Chadwick*, 4 *L. R. Ch. Div.* 869.

ESTOPPEL.—A party who has opposed a motion to vacate an order for consolidation, cannot afterward be heard to complain that the order was not vacated. *Lockhart v. Harrell*, 6 *La. An.* 530.

EXTENSION OF TIME TO PLEAD.—An order staying proceedings pending a motion by defendant to consolidate, does not extend the time to answer, although the motion may be granted. *Jenkins v. Bloodgood*, 22 *Wend.* 645.

An application for an extension of time should be brought within sections 781, 782, and Rule 24 of the General Rules of Practice.

EVIDENCE.—Where a commission, in which the defendant joined, has been issued in the consolidated action, the court will allow the evidence taken thereunder to be read on the trial of the principal action. *Waterbury v. Delafield*, 1 *Cai.* 518; but see *Lofland v. Coward*, 12 *Heis. (Tenn.)*, 546.

A rule to examine witnesses *de bene esse* will be denied to a plaintiff who refuses, in a proper case, to enter into a consolidation rule. *Church v. Clason*, *Col. & Cai. Cas.* 62; see "Adjournments."

JUDGMENT.—When the actions have been consolidated, but one judgment should be entered, and the pleadings in all the actions should be attached together for the purpose of making the judgment-roll. *Davis v. Smith*; MS. case, cited *Holmes & Disb. Pr.* 275; and see *Jackson ex dem. Swartwout v. Stiles*, 5 *Cow.* 292; *Lee v. Board of Township of Kearny*, 42 *N. J. L.* 548, 546.

It seems that where no defense is intended in either of two actions, and consolidation is asked for the purpose of avoiding the expense of entering

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up different judgments, the motion will be granted. *Wilkinson v. Johnson*, 4 *Hill*, 46.

In Particular Cases—Arrest.—If two actions are brought by the plaintiff, against the same defendant, at the same time, for causes of action which might have been joined, and the defendant is held to bail in both actions, it is an oppressive proceeding, and the actions may be consolidated on motion of the defendant. *Cecil v. Briggs*, 2 *Term. R.* 639; S. C., 2 *D. & E.* 639. But to secure the consolidation, it should appear that the same defense is intended in each action. *Thompson v. Shepherd*, 9 *Johns.* 262; and see *Anonymous*, 1 *Chitty*, 709, note.

Attorney's Charges.—Separate actions by an attorney to recover for professional services of different kinds, may be consolidated. *Beardsall v. Cheetham*, 27 *L. J.*, N. S., *Cas. at Com. L.*, 367.

Bonds.—It is improper to bring two actions upon the bond of an administratrix, for not filing inventory, when one action would have answered every purpose; and the actions will be consolidate with leave to the plaintiff to declare *de novo*. *People v. McDonald*, 1 *Cov.* 189.

See, for an instance of the consolidation of actions upon bonds, *Prior v. Kelly*, 4 *Yeates*, 128.

Equitable Actions.—In *Lockwood v. Fox* (8 *Daly*, 127, *Special Term, decided Nov. 1878*), it is said: "Before the new Code, actions for the foreclosure of mortgages upon real estate could not be consolidated. (*Grant v. Spencer*, cited *Voor. Code*, 6th ed., p. 257, note i.) *The provisions of the Revised Statutes have uniformly been held to apply to actions at law only.* (2 *R. S.* 883, § 36; 2 *Wait's Pr.* 555.) And since the new Code went into operation, the supreme court, at special term, held the rule to be the same as before. (*Beck v. Ruggles*, *Daily Reg.*, Sept. 19, 1878.) The language of the new enactment (*Code*, § 817), which is nearly identical with that of the Revised Statutes, clearly indicates that the legislature, having the uniform practice and current of decisions under that statute under consideration at the time of the new enactment, did not intend a change in the law."

In *Voorhies' Code* (6th ed.), 257, note i, it is said: "Actions for foreclosure will not, it seems, be consolidated under any circumstances. A motion to consolidate two foreclosure suits was denied by DAVIES, J., with costs in both suits. (*Grant v. Spencer*, not reported)." The same statement appears in the 9th edition of that work, page 336, note f.; but it is omitted from the 10th edition, for what reason does not appear.

In 2 *Wait's Pr.* 555, 556, it is said: "The several provisions of the Revised Statutes [2 *R. S.* 883, § 36, 37, 38] apply exclusively to the consolidation of actions at law, and have never been construed as applicable to cases in equity. In *Grant v. Spencer* (not reported, cited in *Voorhies' Code*, 336, note f.), a motion to consolidate two foreclosure suits was denied, doubtless on the ground, that suits of this nature did not come

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within the provisions of the Revised Statutes relating to the consolidation of actions."

In *Bech v. Ruggles* (6 Abb., N. C., 69), cited in *Lockwood v. Fox, supra*, from the Daily Register, the motion was to consolidate six actions to foreclose distinct mortgages covering separate adjoining lots. It was held that the language of the Code did not differ materially from that of the R. S.; and it was said: "Under the latter statutes it was held, per DAVIES, J., that actions for foreclosure could not be consolidated. (*Grant v. Spencer*, cited in *Thomas on Mortgages*, 269; 2 Wait's Pr. 555.)"

In this State it has never been held that the provisions of the statute in relation to consolidation are applicable to equitable actions, nor has it been uniformly held, as intimated in *Lockwood v. Fox, supra*, that they apply only to actions at law; the point seems never to have been expressly adjudicated. But the question whether equitable actions can, in the absence of statutory provisions, be consolidated, has, both in England and in some of the States, been the subject of discussion, and has led to very conflicting views.

The early cases of *Scott v. Allgood* (1 *Fou. Ex. Pr.* 81), and *Mason v. Craft* (*Id.* 214), favor the consolidation of such actions.

In *Pyke v. Brook* (4 *Gwill*, 1345, decided in 1791), there was a consolidation, the court remarking that it always required an affidavit that the defendants did not defend by common subscription.

In *Keighley v. Brown* (16 *Ves.* 844, decided in 1809), the intimation is that they can be consolidated, but the order is not, of course.

In *Beach v. Woodyard* (5 *W. Va.* 281, 282), it was said by Moon, J., "I cannot see any reason to lead me to the opinion that the rule for the consolidation of suits in equity should be different from that established for actions at law, unless governed by statute."

And see, in favor of the consolidation of such actions, *Burnham v. Dalling*, 6 *N. J. Ch.* (1 *C. E. Green*), 310; *Ex parte Brown*, 58 *Ala.* 536; *Taylor v. Watkins*, 7 *J. J. Marsh.* 863; *Campbell's Case*, 2 *Eland Ch. R.* 209; *Hoskins v. Campbell*, 2 *Hem. & M.* 43; *Wilson v. Riddle*, 48 *Ga.* 609.

But in *Forman v. Blake* (7 *Price*, 654, decided in 1819), a motion to consolidate causes in equity was denied, mainly upon the ground that there existed no precedent for it.

In *Foreman v. Southwood* (8 *Price*, 572, decided in 1820), a like motion was denied for the want of precedent, and for the inconvenience which would result from such a course under the facts of that case; but Wood, B., dissented.—"His Lordship said, that there was no reason on which the practice in courts of law had been founded, which would not apply to suits of this nature, and the objections, if there were any, to the practice in courts of equity, might be urged against it in courts of law."

In *Warden, etc., v. Isherwood* (2 *Sims.* 476, decided in 1829), a motion to consolidate was denied, the court saying: "The general rule is, that

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every plaintiff shall be at liberty to conduct each suit that he institutes in what way he thinks best. At law there is one exception, in the case of actions upon policies of assurance." This case, it must be observed, displays, on the part of the Vice-Chancellor, a want of knowledge as to the true history of consolidation. The "consolidation rule" was established in the time of Lord MANSFIELD expressly to meet the case of actions upon policies of assurance, while "consolidation" was frequently resorted to before the time of Lord MANSFIELD, and has continued in uninterrupted use down to the present time, and has never been restricted to actions upon policies of assurance. See "Consolidation Rule," *ante*.

[It may be remarked that, by the present English practice, under the judicature acts, actions in the chancery division of the high court of justice, as well as in other divisions of that court, "may be consolidated, by order of the court or a judge, in the manner heretofore in use in the superior courts of common law." *Order 51, Rule 4, Wilson's Judicature Acts (3d ed.), 393; Amos v. Chadwick, 4 Ch. Div., 869.*]

And see, against the consolidation of equitable actions, *Ogden v. Knight, 3 Tena. Ch. (Cooper), 409; Clairborne v. Grose, 7 Leigh (Va.), 881.*

That consolidation was a proceeding at law may be admitted, but it appears that even under the administration of law and equity by separate systems, it was not unknown in equity. When the Revised Statutes and the earlier act of 1818 were framed, we had both systems in operation, and these statutes were applicable to actions at law. But section 3339 of the Code of Civil Procedure abolishes the distinction between actions at law and suits in equity (and see section 69, Code of Procedure, whereby the distinction was abolished before the present revision), and section 484 provides that there may be united in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both; and sections 817-819 do not, in terms, limit consolidation to actions at law, nor to any particular forms or classes of actions. While it is clear that it was not the intent of the codifiers to change the mere mode of practice on moving for a consolidation, nor to alter the requirements under which it might be granted, it may be fairly claimed, by force of our present procedure and the Code provisions, that the remedy of consolidation has been extended to equitable actions.

Of section 169 of the Code of Procedure, for which section 484 of the Code of Civil Procedure is the substitute, it was said in *Wiles v. Suydam* (64 N. Y. 173, 178): "It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single controversy;" and see *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 593, 604; *Pomeroy's Remedies and Remedial Rights*, §§ 468, 465; *Garner v.*

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Thorn, 56 *How.* 452, 457; S. C., *sub nom.* Garner *v.* Harmony Mills, 6 *Abb.*, N. C., 217.

The most obvious distinctions between actions at law and suits in equity are in the mode of granting relief, and the manner of trial. Rubens *v.* Joel, 18 *N. Y.* 488, 491. If two or more actions at law, to recover judgments for different sums of money, may be consolidated into one action to recover the aggregate sum, because the mode of granting relief and the manner of trial are the same in each action, why cannot two or more equitable actions, meeting all the requirements of the concluding paragraphs of section 484, and pending as provided in sections 818-819, and when the pleadings, regarded as a whole, would not be open to the objection of multifariousness, be consolidated? The mode of granting relief and the manner of trial would be the same in the consolidated action, as if the actions had been prosecuted separately. To limit consolidation to actions at law, because such remedy was usually administered at law, would seem to require a much stricter construction of section 3339 of the Code of Civil Procedure than was ever given to section 69 of the Code of Procedure (see cases collected in *Wait's N. Y. Annotated Code*, § 69; *Bliss' N. Y. Annotated Code, Part I*, page 330, notes 1-6); and the effect of such limitation would be to preserve a useless distinction, which is at variance with the intent of the first codifiers, whose efforts, while not directed to the abolition of the natural and inherent distinction between equitable and legal causes of action, were, among other things, aimed at the overthrow of the distinction between legal and equitable remedies, in the establishment of a uniform course of procedure in actions of both characters. *Preamble to the Code of Pro.; Report of the Commissioners*, 67; Phillips *v.* Gorham, 17 *N. Y.* 270, 272-274; Lattin *v.* McCarty, 41 *N. Y.* 107, 110; Minor *v.* Webb, 15 *Abb.* 284, 285.

In many equitable actions, as well as actions at law, a consolidation might be attended with such great practical inconvenience as to outweigh the usual advantages following from the proceeding; but, when this is made to appear, it would be within the discretionary power of the court to deny the application. (§ 817.)

The only case which seems to go to the extent of holding that the provisions of the Code of Civil Procedure, in relation to consolidation, are not applicable to equitable actions, is Lockwood *v.* Fox, *supra*. It is based upon Grant *v.* Spencer, *supra*; 2 *Wait's Pr.* 555, *supra*; and Bech *v.* Ruggles, *supra*.

Although an action for the foreclosure of a mortgage belongs to the class of equitable actions, it is only one of a class which includes many varieties. And, while Grant *v.* Spencer may hold that actions for the foreclosure of mortgages cannot be consolidated, it does not go so far as to decide that no equitable actions can be consolidated. There may be excellent reasons for refusing to consolidate actions for the foreclosure of

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mortgages, such, for instance, as are stated in *Kipp v. Delamater* (58 *How.*, 188, see *post*, "Foreclosure"), and appear from the facts in *Bech v. Ruggles*; and, for sooth that appears in the meagre report of *Grant v. Spencer*, the decision may have turned upon the peculiar facts of that case, which would deprive it of authority, even in other motions to consolidate such actions; for it only *seems* that actions for foreclosure will not "be consolidated under any circumstances." Certainly, this case cannot be regarded as an authority for denying consolidation in all varieties of equitable actions.

2 *Wait's Pr.* 555, would convey the impression, that the decision in *Grant v. Spencer* was adverse to the consolidation for the reason, that the foreclosures of mortgages were equitable actions. Such a reason cannot be extracted from the case.

Bech v. Ruggles, *supra*, is also based upon 2 *Wait's Pr.*, 555, and upon *Grant v. Spencer*, as cited in *Thomas on Mortgages*. Mr. Thomas, however, puts forward no other case in support of the doctrine that actions for the foreclosure of mortgages cannot be consolidated. But *Bech v. Ruggles*, on its facts, and for the reason stated in *Kipp v. Delamater*, *supra*, was correctly decided; and it does not go to the extent of holding that consolidation must be denied in all equitable actions.

On examining the cases which pretend to assign any general reason against the consolidation of suits in equity, it will be found that they proceed mainly upon the assumption that, "every plaintiff shall be at liberty to conduct each suit that he institutes in what way he thinks best," and that therefore equitable actions should not be consolidated. It is submitted that this reasoning, should it prevail, would do away with all consolidation, and lead to the utmost hardship and oppression; and that it strikes at the very object of consolidation at law. (See "Object of Consolidation," *ante*.) But, on the other hand, every reason which might be urged in favor of the consolidation of actions at law would apply, with equal force, to the consolidation of equitable actions. See the dissenting opinion of WOOD, B., in *Foreman v. Southwood*, *supra*.

A motion to consolidate particular actions for foreclosure might well be denied, under the Code, without necessarily deciding that no equitable actions could be consolidated. The facts of *Lockwood v. Fox* do not appear in the report of the case, and there is nothing to show that the decision of the general proposition was necessarily involved. The opinion seems to have accepted the general proposition as established, on the authority of *Grant v. Spencer* and 2 *Wait's Pr.* 555, for the purpose of supporting the denial of the motion.

When traced to its origin, even the doctrine that actions for foreclosure cannot, regardless of the facts of each particular application, be consolidated, rests upon the frail foundation of *Grant v. Spencer*.

Until the question of the consolidation of equitable actions has been

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fairly presented, and expressly decided in the negative, it may be regarded as an open one, and not concluded by *Lockwood v. Fox*. See "*Foreclosure*," *post*.

Foreclosure.—Actions to foreclose mortgages on real property cannot be consolidated. *Grant v. Spencer*, MS. case, cited *Voorhies' Code* (6th ed.), 257, *note i*; S. C., *Id.* (9th ed.), 886, *note f*; *Bech v. Ruggles*, 6 *Abb., N. C.*, 69; *Lockwood v. Fox*, 8 *Daly*, 127; *Kipp v. Delamater*, 58 *How.* 183. But for an intimation to the contrary, see *Eleventh Ward Savings Bank v. Hay*, 8 *Daly*, 828, S. C., 55 *How.* 438, affirmed 73 *N. Y.* 609, and see section 1989.

In *Kipp v. Delamater*, *supra*, where the rights of the defendants were different, and the actions sought to be consolidated were brought upon mortgages, not in all cases covering the same parcels of land, it was said: "The proceeding are *in rem* against different pieces of property, and there is no reason why one parcel should bear burdens, in the way of costs, which belong to another. Rights of individual defendants differ, and one defendant should not bear that which belongs to another." See "*Equitable Actions*," *ante*.

Justices' Courts.—A justice's court has no power to consolidate actions; and the remedy of the defendant is an injunction enjoining proceedings in all the actions except one, and until that action can be finally heard and determined. Such an injunction may be granted on terms. *Third Ave. R. R. Co. v. The Mayor*, 54 *N. Y.* 159.

By subdivision 6 of section 8347, the provisions of sections 817-819 apply to courts of record.

Insurance.—The rule for consolidation applies to several actions on one policy, but it does not extend to several policies on one risk, although the questions involved be the same. *Cammann v. N. Y. Ins. Co.*, 1 *Cai.* 114; see *McGregor v. Horsfall*, 8 *M. & W.* 820; S. C., 6 *D. P. C.* 838; 2 *Jur.* 257.

The "consolidation rule" proper was always regarded as a favor to the defendants, and under the later English practice is not absolutely binding upon the plaintiff, when the result of the action tried is adverse to him, and one or more of the remaining actions may be tried. *McGregor v. Horsfall*, *supra*; *Doyle v. Anderson*, 1 *A. & E.* 635; *Doyle v. Douglas*, 4 *B. & Ad.* 544; *Long v. Douglas*, *Id.* 545, *note*; *Syers v. Pickersgill*, 27 *L. J. Exch.* 5.

See, generally, as to the English practice under the "consolidation rule," *Lewis v. Barkes*, 4 *C. B.*, N. S., 830, S. C. 4 *Jur.*, N. S., 663, 27 *L. J.*, C. P., 247; *Ohrly v. Dunbar*, 1 *N. & P.* 244, S. C. 5 *A. & E.* 824, 2 *H. & W.* 454; *Reed v. Isaacs*, 6 *Moore*, 437; *Kynaston v. Liddell*, 8 *Id.* 223; *Hollingsworth v. Broderick*, 4 *A. & E.* 646, S. C. 6 *N. & M.* 240; *Penson v. Lee*, 2 *B. & P.* 830; 19 *Geo. 2, chap. 37, § 7; Rules of Q. B., C. P., and*

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Exch. (1858); 1 *El. & Bl. Appx. IV*; *Order 80, Rule 1, Wilson's Judicature Acts* (3rd ed.), 287.

Libel.—Two actions for the same libel, one against the editor, and the other against the proprietor, of a newspaper, cannot be consolidated, although the complaints and answers in each action are the same, and the questions which will arise and the defenses in each action are substantially the same; because the parties are not the same in each action, and there might be proof in aggravation of damages against one defendant, which would not apply to the other. *Cooper v. Weed*, 2 *How.* 40, decided in 1845.

Where the plaintiff brought an action in each county of the State, against the same defendants, at the same time, for one and the same libel, originally published in the county where both the plaintiff and the defendants resided, it was held, that the actions could be consolidated, and should be tried in the county where the libel was first published, and that the motion to consolidate was properly made in that county. *Percy v. Seward*, 6 *Abb.* 326; and see *Jones v. Pritchard*, 6 *Dow. & L.* 529, S. C., 18 *L. J., N. S., Part II.*, 104; *Whitney v. Adams*, 10 *Jur., N. S.*, 471, S. C., 15 *C. B., N. S.*, 892. But consult *Sherman v. McNitt*, 4 *Cow.* 85, 86, and *Martin v. Kennedy*, 2 *Bos. & P.* 69.

Two or more causes of action for libel may be joined in the same complaint. Section 484. See " *Slander*," post.

Mechanics' Liens.—Two actions to foreclose mechanics' liens should not be consolidated, where the plaintiff in the second action is a defendant in the first action, and all the equities are to be passed upon in the first action, and the rights of the plaintiff in the second action could be protected in the first. *Graff v. Rosenbergh*, 6 *Abb., N. S.*, 428, note.

Partition.—Where the lands are situate in different counties, the actions cannot be consolidated. *Mayor v. Mayor*, *supra*. And see the concluding member of the last sentence of section 484, and section 982.

Penal Actions.—Consolidation of criminal actions is not favored, and so, it seems, in regard to penal actions, at least when the consolidation would cast upon the court and jury great labor. *Benton v. Praed*, 1 *Smith*, 428; see *The King v. Warlow*, 2 *Mar. & Sel.* 75.

Promissory Notes and Bills of Exchange.—In *Caines' Pr.* 134, it is said, citing MS. case of *Phillips v. Roget*, decided in 1802, "the court will not compel the plaintiff to consolidate several suits brought on several promissory notes by the same plaintiff against the same defendant, for the defenses may be different." In *Thompson v. Shepherd* (9 *Johns.* 262), where three separate actions were brought on promissory notes dated on different days, for different sums, payable to the same person, and the notes were all due at the time when the actions were brought, a motion to consolidate was denied, it not appearing that the same defense was to be set up in each action; and it was said,

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"we should be inclined to say, that where separate suits are brought upon notes or contracts made at the same time, and which might have been united in one action, and when the defense is the same in all a consolidation rule ought to be granted;" and see *Worley v. Glentworth*, 10 N. J. L. 241; *Gerding v. Anderson*, 64 Ga. 304; *Logan v. Mechanics' Bank*, 13 Id. 201; *Buie v. Kelly*, 7 *Jones (Law)*, 266. It is not now a sufficient objection to the consolidation, that the second cause of action had not accrued at the time the first action was commenced. *Dunning v. Bank of Auburn*, 19 *Wend.* 23; and see *Brewster v. Stewart*, 8 *Wend.* 441; *Oldershaw v. Tregwell*, 8 *Car. & P.* 58; *Briggs v. Gaunt*, 4 *Duer*, 664.

In *Bank of U. S. v. Strong* (9 *Wend.* 451) a motion to consolidate two actions upon promissory notes was granted.

For instances of the consolidation of actions upon promissory notes, see *McKay v. Reed*, reported *post*, "Removal of Actions for Consolidation;" *Runsey v. Wynkoop*, 1 *Yeates*, 5; *Merrihew v. Taylor*, 1 *Brown, Appx.* lxvii; *Scott v. Brown*, 1 *Nott & McC.* 447, *note*; *Planters'*, etc., *Bank v. Cohen*, 2 *Id.* 440, *note*.

Several actions against the maker of promissory notes, which have been guaranteed by different persons, should not be consolidated; for should the plaintiff recover but one judgment and issue but one execution, and fail to collect from the defendant, the question of the liability of the guarantors might be embarrassed by the consolidation. *Potter v. Pattengille*, 8 *Abb.*, *N. S.*, 189.

Actions upon promissory notes which have different indorsers should not be consolidated. *Planters'*, etc., *Bank v. Cohen*, 2 *Nott & McC.* 440, *note*.

For instances of the consolidation of actions upon bills of exchange, see *Booth v. Payne*, 1 *Dowl.*, *N. S.*, 398, *S. C.*, 5 *Jur.* 1087; *Oldershaw v. Tregwell*, 8 *Car. & P.* 58.

Slander.—Two actions for slander, one against the husband, and the other against the husband and wife, cannot be consolidated. *Swithin v. Vincent*, 2 *Will*, 237; and see *Malone v. Stilwell*, 15 *Abb.* 421.

One action for slander should not be held to abide the event of another action of the same kind. "The question is one of damages, upon which there is no certain rule, and which belongs almost exclusively to the jury. The plaintiff having tried one cause, in which he obtains a verdict for a certain amount, may still go before another jury, in another cause, and litigate the same question, and demand a heavier sum, and perhaps have it allowed, on precisely the same state of facts as appeared upon the first trial. This is not that kind of a question over which the court ordinarily exercises any control upon a motion for a new trial; nor would it be proper, in such a case, for the court to order that one cause should abide the event of the other." *Sherman v. McNitt*, 4 *Cow.* 85 (decided 1825); and see *Cooper v. Weed*, 2 *How.* 40.

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And where actions for tort against different defendants have been consolidated, see, as to the submission of each defense to the jury, Mitchell *v.* Smith, 4 *Md.* 408.

Two or more causes of action for slander may be joined in the same complaint. Section 484.

Quasi Consolidation.—In some cases which do not admit of consolidation under the terms of the statute, or when it is deemed advisable, under the peculiar facts of the application, to deny the motion for a consolidation, the court will sometimes, pending the determination of one action, or one action of each class, stay proceedings in all the remaining actions, which usually abide the event of the action tried. A few instances are given below.

This proceeding which resembles, in many respects, the "consolidation rule," may be conveniently designated as *quasi* consolidation. Lee *v.* Township of Kearny, 42 *N. J. L.* 548; Den *ex dem.* Smith *v.* Kimble, 9 *Id.* 333.

Actions Divisible into Different Classes.—Where the plaintiff brought sixty-four actions against the same defendant, to recover penalties for a violation of the same statute, and the defendant moved for an order of consolidation, on the ground that the questions which would arise and the defenses were substantially the same in all the actions, the court refused to grant the motion, for the reason that the consolidation would probably render the trial both protracted and embarrassing. But it being conceded by both sides that the actions were divisible into two classes, the plaintiff was directed to select one case from each class and bring it to trial; and leave was given to move for the disposition of the remaining actions, after such trial. Clark *v.* Metropolitan Bank, 5 *Sand.* 665; and see Benton *v.* Praed, 1 *Smith*, 428; Cordier *v.* Cordier, 26 *How.* 187; Geery *v.* Scholes, 11 *Hun.* 428.

Actions for Misapplication of Money.—An instance of, Bennett *v.* Lord Bury, 5 *L. R. Co. P. Dic.* 339.

Bonds.—Instances of, Anderson *v.* Towgood, 1 *Q. B.* 245; Cox *v.* Lythgoe, MS. case cited 8 *Chitty Gen. Pr.* 645, note.

Courts of Equal Rank.—One of two actions, pending in courts of equal rank, between the same parties, although relating in part to the same subject-matter, but begun at different times, and dependent upon different facts and circumstances, will not be stayed pending the determination of the other. The court having acquired jurisdiction must, under such facts, retain it, if the plaintiff insist. But if the actions were identical, and only the same questions were involved, it seems that, as a matter of discretion and to do substantial justice, one of the actions might be stayed by the court in which it was pending. Sorley *v.* Brewer, 18 *How.* 509.

Ejectment.—Where several actions of ejectment are brought by the same

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plaintiff against different defendants, and all depend upon the same title, and the questions to be litigated and the evidence are the same in all the actions, it is competent for either party to make an application to the court, before the circuit arrives, that one of the causes be carried to trial, and that the plaintiff be not prejudiced by his omission to try the remaining cases; and, in a clear case, that they abide the event of the cause to be tried. In passing upon such a motion, the court would be guided by the admissions of the party against whom the motion is made. If the affidavits of the parties should agree that the points of inquiry and the evidence would be the same in all the cases, the motion should be granted. If they should disagree, though they leave the matter only in doubt, the motion should be denied. *Jackson ex dem. Pionier v. Schuber*, 4 *Cow.* 78 (decided 1825); and see *Jackson ex dem. Swartwout v. Stiles*, 5 *Cow.* 282; *Den ex dem. Smith v. Fen*, 9 *N. J. L.* 335.

In *Doe ex dem. Pultney v. Freeman* (2 *Sellon's Pr.* 144), where, in thirty-seven actions of ejectment, all depending upon the same title and against different defendants, the defendants sought to stay proceedings in all of the actions except one, and that the remaining actions might abide the event of the action tried, "Lord KENYON said it was a scandalous proceeding [on the part of the plaintiff]; they all depended precisely on the same title, and ought to be tried by the same record." And see *Grimstone v. Burgers*, *Barnes' Notes*, 176.

But the rule in *Jackson ex dem. Pionier v. Schuber, supra*, applies only where all the cases involve the same question and the same evidence in relation to a right of property, and it does not extend to actions for slander, where the question is one of damages. *Sherman v. McNitt*, 4 *Cow.* 85, reviewing *Sherman v. McNitt*, 2 *Cow.* 452.

To save the payment of the witness' fees, the party desiring the remaining actions to abide the trial of one, should notify the other side to such effect. *Bridgen v. Van Woert*, 2 *Cow.* 452, note.

Guarantees. — An instance of, *Sharp v. Lethbridge*, 2 *Man. & G.* 87.

Injunction. — Where numerous actions were brought in a justice's court, by the same plaintiff against the same defendant, to recover penalties for violations of the same city ordinance, and the question involved in all of the actions was the same, and the decision of one action would have determined the others, and the plaintiff offered to give security for the payment of the sum claimed in all of the actions, if it should finally be decided that he was liable for the penalties, and also for the expenses of prosecuting the action necessary to determine the liability, and he sought in a court of equity to enjoin, by injunction, the prosecution of all of the actions except one; it was held, that as the justice's court had no power to consolidate the actions, or to give such relief as desired, and it was not the endeavor to prevent a decision in one of the actions, and as the injunction operated only as a temporary stay pending the decision of the one

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action to be tried, and the relief afforded by the injunction was merely the same as that of a consolidation of actions in a court of record, the injunction was properly granted; that the granting of the injunction was within the principle of preventing a multiplicity of actions, and that it would obviate an oppressive and onerous accumulation of costs. *Third Ave. R. R. Co. v. The Mayor*, 54 N. Y. 159.

Issues of Law. — Upon issues of law, a plaintiff who brings a multiplicity of actions must take the responsibility of meeting them all in the usual way, and a motion for *quasi* consolidation will be denied. *Ferrett v. Atwell*, 1 *Blatchf.* 151, 152.

Slander. — See "In Particular Actions;" "*Slander*," *ante*.

Appeal. — When the plaintiff has regularly obtained judgment in different actions against different defendants, and it does not appear that the same questions are involved in each action, the court has no power to stay the execution of the judgments, pending the decision of the general term upon one of the actions. If the various defendants would have a stay, they must appeal in each of the actions. On appeal, where it is made to appear that a decision of one cause will dispose of all the questions, the court may grant an order to hear argument in only one case, and that the others abide the event, or it may refuse to hear but one argument. *Toll v. Thomas*, 15 *How.* 315 ; see *Ferrett v. Atwell*, 1 *Blatchf.* 151, 153.

When Defendant Proceeded against in Different Characters. — One of two actions will not be stayed pending the determination of the other, when the defendant is proceeded against and held to bail in two different characters, and the causes of action are such as could not properly be joined. *Wise v. Prowse*, 9 *Price*, 393.

Stipulation. — Where, in several actions by different plaintiffs against the same defendant, a stipulation was made, whereby the parties agreed that the proceedings in the various actions should be stayed, and that they should abide the result of the final judgment in one of the cases, involving the question of law, and final judgment in that case having been given for the plaintiff, it was held that, on a reference to assess the damages in all the cases, the defendant could be allowed to controvert the proof as to damages only ; that by the stipulation he had precluded himself from examining into any other part of the case. If the defendant had merely intended to have the question of law involved in the cases settled by the determination of the pioneer case, he should have so stipulated, and it would then have been sufficient to have provided simply for a stay of proceedings in all the remaining cases, until the case brought on was disposed of. *Honlahan v. Sackett's Harbor R. R. Co.*, 24 *How.* 155.

Consent to be bound by a verdict in the action which shall be tried, means such a verdict as should stand. *Hodson v. Richardson*, 3 *Burr.* 1477 ; *Anon., Loftl.* 147 ; *Aylwin v. Favine*, 5 *Bos. & P.* 480 ; *Gill v. Hinckley*, 1 *Moore*, 79 ; *Higginson v. Gray*, 8 *Mass.* 885.

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When a party has made an agreement that his suit shall abide the event of another, the court will not relieve him from his agreement, on the allegation that he did not know the state of such other suit, when no charge of deception is made, and where it appears that he might, by due inquiry, have learned the precise state of such other action. *Mutual Security Ins. Co. v. Drummond*, 3 *Code R.* 143.

Equitable Actions.—The reasons for *quasi* consolidation apply as well to equitable actions as to actions at law. *Andrews v. Spear*, 4 *Dill.* 470, 471. For this proceeding in a variety of cases, see *Foxwell v. Webster*, 9 *Jur. N. S.*, *Part I*, 187, S. C., 12 *Weekly R.* 186, 2 *Drew & Sm.* 250; *Cumming v. Slater*, 1 *Y. & C. C. R.* 484; *Godfrey v. Maw*, *Id.* 485; *Lehigh*, etc., R. R. Co. v. *McFarlan*, 30 *N. J. Eq.* 185, 144; *Andrews v. Spear*, *supra*, (consolidated in federal courts); *Frost v. Wood*, 12 *Weekly R.* 285; *Smith v. Guy*, 2 *Coop. temp. Coll.*, *Part II*, 290, and *note*; *Smith v. Guy*, 2 *Phil. Ch.* 159; *Wendell v. Wendell*, 3 *Paige*, 509; *Underwood v. Gee*, 1 *Macn. & G.* 276; S. C., 17 *Sim.* 119; *Kelk v. Archer*, 16 *Jur.*, *Part I*, 605; *Gage v. Lord Stafford*, 1 *Ves. Sr.* 544; *Amos v. Chadwick*, 4 *L. R. Ch. Div.* 869; *Dryen v. Foster*, 6 *Bewan*, 146; *Rigby v. Strangways*, 2 *Phil. Ch. R.* 175; *Amos v. Chadwick*, 9 *L. R. Ch. Div.* 459, *C. A.*

REMOVAL OF ACTIONS FOR CONSOLIDATION.—Section 818 of the Code, which is the substitute for 2 *R. S.* 883, § 87, provides, that where one of the actions is pending in the supreme court, and another is pending in some other court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that pending in the supreme court.

This provision, as found in the *R. S.*, was added by the revisers (see "Code Provisions," *ante*); and, in a note thereto, it is said: "Laws 1818, p. 280, § 7. The section referred to makes no distinction between suits in different courts, but seems to authorize their consolidation by each court. It is believed that this would be impracticable by the inferior courts, and that it could be done only by the supreme court, where such a power may often be exercised with the most salutary effect."

Subdivision 6 of section 8847 of the Code of Civil Procedure makes sections 817-819 applicable to all courts of record. Whatever the intent of the codifiers may have been, this provision of the Code, according to *McKay v. Reed*, here reported, has been to extend to other courts, besides the supreme court, the power of removal for consolidation.

N. Y. Marine Court, Special Term; December, 1882.

MCKAY v. REED.

§§ 818, 8847.

Motion by defendant for the removal of an action pending in a district court, and for its consolidation with another action pending in the marine court.

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The facts are stated in the opinion.

N. B. Cooke, for motion.

W. E. Page, opposed.

McADAM, J. — The plaintiff commenced this action against the defendant on the 1st day of November, 1882, to recover the amount of three certain promissory notes made by the defendant, aggregating in amount \$638.16. The defendant answered by pleading a counterclaim as a defense. The plaintiff, thereafter and on the 18th of December, 1882, commenced an action against the defendant in the sixth judicial district court, on another promissory note made by the defendant, for \$101.75. The defense to this note is similar to that interposed to the others. The defendant moves to consolidate the two actions, by bringing into this court the action subsequently commenced in the district court. The defendant has brought himself within the rule which entitles a defendant to consolidate actions, and the only question to be considered is one of power. The Code (§ 818) provides that: "Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court." Section 8347 of the Code, in defining the powers of the other courts, provides that section 818, *supra*, shall be applicable to all courts of record, so that so far as the present application is concerned, section 818 is, by construction, to be read as if the word "marine" court had been inserted in that section instead of the "supreme."

So construed, it is evident that the necessary power to consolidate exists, by virtue of which this court, by order, removes to itself the action pending in the district court, to the end that the pleadings in the marine court suit be amended to embrace all the causes of action aforesaid.

The defendant may present the order necessary to carry this decision into effect.

See "Consolidation in Courts of Equal Rank," *post*.

CONSOLIDATION IN COURTS OF EQUAL RANK. — It will be observed that *McKay v. Reed* (see "Removal of Actions for Consolidation," *ante*), was a case where one of the actions was pending in a court of record and the other in a court not of record, and that the courts were, therefore, of unequal rank. The Code makes no provision for the consolidation of actions pending in separate courts of equal rank; as, for example, the court of common pleas for the city and county of New York and the superior court of that city.

The tendency of late years has been to enlarge the jurisdiction of courts of record below the grade of the supreme court, and there are now more courts of what may be termed general jurisdiction than at the time when

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the Revised Statutes were enacted; and, consequently, there is a greater opportunity to institute important actions in different courts, and less likelihood that one of the actions will be brought in the supreme court. The provision of 2 R. S. 883, § 87, in regard to the removal and consolidation of actions, where one should be pending in the supreme court, was, perhaps, quite ample when enacted. But to keep pace with this enlarged jurisdiction, and to permit suitors, at all times, to reap the benefit of consolidation, it would seem that some additional enactment for the removal and consolidation of actions in courts of equal rank, was required. For many causes of action, when the plaintiff and defendant both reside in the city of New York, it is possible, at present, for the plaintiff to maintain at least two actions, which might be subject to consolidation but for the fact that they are pending in courts of equal rank. Other examples of oppression, which might grow out of this omission, will readily present themselves to the practitioner.

See "Quasi Consolidation; *Courts of Equal Rank*," *ante*.

HAINES, ADMINISTRATRIX, ETC., v. JEROLOMAN.**SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM ;
SEPTEMBER, 1882.****§§ 549, 1487, 3343.**

Execution against the person.—May be issued in action for "personal injury," although no order of arrest has been granted.—"Personal injury."—What is included in.—Right of arrest for, arises from nature of action.

By subd. 9 of section 3343 of the Code, a "personal injury" includes an actionable injury to the person of the plaintiff, or of another; and, by subd. 2 of section 549 in an action to recover damages for a "personal injury," there exists an absolute right to an arrest from the nature of the action.

Where, on a judgment for damages recovered in an action brought by an administratrix for the death of her intestate, caused by the negligence of the defendant, an execution against the property of the defendant had been returned unsatisfied,—*Held*, the action being one for a "personal injury" and the right to arrest depending upon the nature of the action, that an execution against the person might issue under

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subd. 1 of section 1487, although no order of arrest had been granted in the action.

Ryall v. Kennedy (52 *How.* 519 [S. C., 41 N. Y. *Supr.* 531]), distinguished as having been decided before the enactment of section 3343 of the Code.

Motion by defendant to set aside an execution against his person.

The action was brought by the plaintiff, as the administratrix of one Charles Haines, to recover the sum of \$5,000 damages for the death of said Haines, caused by the negligence of the defendant in the use and care of a hatchway upon his premises, through which the plaintiff's intestate fell and received injuries from which he died.

The plaintiff recovered judgment for \$1,676.95, and an execution against the property of the defendant was issued and returned wholly unsatisfied, and thereupon an execution against his person was issued and executed. No order of arrest had been granted in the action.

The motion to set aside the execution was made upon the grounds, that by section 1487 of the Code an execution against the person could be issued, only (1) where the plaintiff had a right to arrest the defendant by reason of the nature of the action; (2) or where an order of arrest had been granted and executed in the action; that this action was not one to recover damages for a "personal injury" within subd. 2 of section 549, and there existed no right, in the nature of the action, to arrest; and that as no order of arrest had been granted, either on account of the nature of the action, or upon facts extrinsic to the cause of action, an execution against the person would not lie.

I'hilbin & Orr, for motion:

Cited as against the execution, *Ryall v. Kennedy*, 52 *How.* 517.

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M. J. Costello, opposed:

The action was for a "personal injury" within subd. 2 of section 549; for by subd. 9 of section 3343 the phrase includes an "actionable injury to the person either of the plaintiff, or of another."

The right of arrest existing by reason of the nature of the action, it was not necessary to first obtain and execute an order of arrest before issuing an execution against the person; when the execution against the property had been returned unsatisfied, the right to issue an execution against the person accrued, subd. 1 of section 1487, *Section 1490*; *Wood v. Henry*, 40 N. Y. 126; *Philbrook v. Kellogg*, 21 Hun, 238; *Gibbs v. Hichborn*, 12 *Id.* 480; *Catlin v. Adirondack Co.*, 20 *Id.* 480.

The "personal injury" which may be the basis of an action need not be an injury to the person of the plaintiff. The case of *Ryall v. Kennedy* (52 *How.* 519), should be distinguished as having been decided before the enactment of section 3343, wherein a "personal injury" is defined, and also by the fact that non-residence is not now a cause of arrest *per se* in actions not arising out of contracts as it was under section 179 of the Code of Procedure.

Before the case of *Ryall v. Kennedy*, *supra*, the definition of a personal injury was not restricted to an actual injury to the person of the plaintiff, *Delamater v. Russell*, 4 *How.* 234, S. C., 2 *Code R.* 147; *Taylor v. North*, 3 *Code R.* 9; *Straus v. Schwarzwaelden*, 4 *Bosw.* 627.

LAWRENCE, J.—This motion will be denied with costs, for the reason that by subd. 9 of section 3343, the term "personal injury" includes, among other cases, "an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another." By subd. 2 of section 549 of the Code of Civil Procedure, in an action to recover damages for a personal injury,

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there is an absolute right to an arrest from the nature of the action. And in such a case, where an execution against the property has been returned unsatisfied, an execution against the person may issue (Code, sections 1487, 1490).

The case of *Ryall v. Kennedy* (52 *How.* 519), was decided in 1876 or 1877, and the provisions of subd. 9 of section 3343 of the Code, necessarily were not considered by the learned justice who wrote the opinion in that case.

CASTRO v. URIARTE.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF N. Y.,
EQUITY TERM; JUNE, 1882.

§§ 484, 488, 492.

False imprisonment.—Malicious prosecution.—Common law remedies for.—Causes of action for, may be united in same complaint.—When action for malicious prosecution will lie.—Malicious prosecution need not be upon valid legal proceedings.

Where the complaint contained two causes of action, the first for false imprisonment, alleged, in substance, to have arisen from an arrest of the plaintiff, procured by the defendant in extradition proceedings under a treaty, on the charge of forgery, upon a warrant void for the want of jurisdiction in the commissioner to issue the same, and for various defects; and the second for malicious prosecution, alleged, in substance, to have arisen from the arrest and imprisonment of the plaintiff by the procurement of the defendant, upon a warrant issued by the same officer, upon the same day, and for a like offense, and setting forth the examination and acquittal of the plaintiff, the termination of the proceedings, and that the acts of the defendant were done falsely and maliciously, and without reasonable and probable cause; and the defendant demurred to the second cause of action on the ground that it did not state facts sufficient to constitute a cause of action, and he also demurred to the whole complaint on the ground that it appeared upon the face thereof that causes of action had been improperly united, contending, in regard to the demurrer to the second cause of action, that

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an action for malicious prosecution would lie only upon *valid* judicial proceedings, the validity of which must appear by the complaint; that it would not lie upon proceedings void for the want of jurisdiction; and that this cause of action was defective in such respect, by not alleging either generally that the officer had jurisdiction, or in showing facts sufficient to authorize the issuing of the warrant; and contending, in regard to the demurrer to the whole complaint, that an action for false imprisonment and one for malicious prosecution could not both be maintained upon the same proceeding and arrest, that the former action must be based upon a want of jurisdiction, and the latter upon a valid legal proceeding; and that if the second cause of action should be held sufficient in showing jurisdiction in the officer who issued the warrant, then it would be *inconsistent* with the first cause of action, which was based expressly upon the want of jurisdiction; and, therefore, the joinder of these two causes of action in the same complaint was in violation of the provisions of section 484 of the Code, — *Held*, overruling the demurrs:

That an action for malicious prosecution would lie against a person who had maliciously, and without probable cause, set on foot, before a tribunal of competent jurisdiction, legal proceedings, although such proceedings were invalid: ["]

That the proceedings being, in this case, within the general scope of the officer's jurisdiction, and the arrest having been procured falsely, maliciously, and without probable cause, as charged, it did not lie in the mouth of the defendant to insist that the proceedings were defective: ["]

That the causes of action, even if it should appear that they were both upon one and the same proceeding and arrest, were not necessarily inconsistent with each other, for, should the proceedings upon the warrant be found to be irregular and void, either action would lie by reason of the general jurisdiction of the officer over the subject-matter: [", "]

That there being nothing in the complaint showing that both causes of action were for one and the same proceeding and arrest, it could not, upon demurrer, be taken that they were. ["]

Whatever doubt may exist as to the right to maintain an action for malicious prosecution in a case where the magistrate issuing the warrant to arrest was wholly without jurisdiction of the subject-matter, or of the offense charged, the weight of authority, not only in this State, [", "] but in this country generally, ["] as well as in England, ["] is to the effect, that the action will lie against the person upon whose complaint the warrant was issued, though the proceedings were irregular and invalid as conferring no jurisdiction, provided the subject-matter, the offense, and the person were within the magistrate's jurisdiction. [", "]

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Nebenzahl v. Townsend (61 *How. Pr.* 353), has not the weight of an express adjudication to the effect that an action for malicious prosecution will not lie, except upon a valid legal proceeding. [¹⁷]

A cause of action for malicious prosecution and one for false imprisonment may be united in the same complaint under subd. 2 of section 484 of the Code; [¹] they might be so united, even were it to appear that they both arose out of one and the same proceeding and arrest. [^{18, 22}]

Provisions of 2 R. S. 558, § 16, in relation to actions for injury to the person or property of another, by wrongful act, discussed. [^{11, 12}]

Common law remedy for false imprisonment, stated. [^{1, 2, 3, 4, 5}]

Common law remedy for malicious prosecution, stated. [^{1, 2, 3, 4}]

What may constitute malicious prosecution. [^{1, 2, 3, 22}]

What may constitute false imprisonment. [^{1, 2, 3}]

Demurrer to a complaint containing two causes of action, the first for false imprisonment, and the second for malicious prosecution, on the ground that causes of action had been improperly united; and demurrer to the second cause of action, on the ground that it did not state facts sufficient to constitute a cause of action.

The facts are sufficiently stated in the opinion.

Sidney Webster, for defendant.

Carpenter & Mosher, for plaintiff.

BROWN, J. — This is an action against the defendant, the Consul-General of Spain, to recover damages for an alleged false imprisonment and malicious prosecution, in proceedings for the extradition of the plaintiff under the treaty with Spain of January 5, 1877 (19 U. S. St. at L., 650). This being a common law action, the sufficiency of the pleadings upon the demurrer is to be determined according to the New York Code of Civil Procedure (*U. S. Rev. Stat.*, § 914).

The amended complaint contains two counts, or causes of action, separately stated. The first charges that the defendant, on the 2d of October, 1881, appeared before John A. Osborn, a commissioner of the circuit court of the United States for the southern district of New York,

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and charged the plaintiff with forgery, at Havana, Cuba, on or about September 25, 1881, and, thereupon, procured the commissioner's warrant for the arrest of the plaintiff, upon which he was taken before the commissioner by the active procurement and aid of the defendant, and for several days restrained of his liberty ; that at the time of issuing said warrant, and of the arrest of the plaintiff thereunder, the commissioner had, in fact, no jurisdiction, and the warrant was wholly void for various reasons, stating, among others, that no mandate or preliminary warrant had been obtained from the executive department prior to the proceedings before the commissioner (*Ex parte Kaine*, 3 *Blatchf.*, 1, 6, 10 ; *In re Thomas*, 12 *Id.*, 370), and that the warrant itself, for various defects upon its face, was wholly void. The second cause of action alleges the arrest of the plaintiff upon a warrant issued by the same commissioner, upon the same day, on a similar charge of forgery, under which, by defendant's procurement, he was imprisoned on the 2d day of October, and restrained of his liberty until October 4, 1881, when, after examination, the plaintiff was held not guilty, and discharged, and fully acquitted by the commissioner ; and that the said proceedings have been fully ended and determined ; that all the acts and doings of the defendant were done falsely and maliciously, and without reasonable and probable cause, and claims as damages \$10,000.

The defendant demurs to the second cause of action, on the ground that it does not state facts sufficient to constitute a cause of action. He also demurs to the whole complaint, on the ground that it appears on the face thereof that the first and second causes of action are improperly united — the first cause of action being for false imprisonment, and the second for malicious prosecution, founded on the same alleged acts and supposed wrongs.

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Section 488 of the Code of Civil Procedure specifies eight causes for which the defendant may demur to a complaint. Subdivision 7 is, "That causes of action have been improperly united;" subdivision 8, "That the complaint does not state facts sufficient to constitute a cause of action."

By section 492 the defendant may demur to the whole complaint, or to one or more separate causes of action stated therein.

[1] Section 484 specifies the causes of action which may be joined in one complaint; and subdivision 2 embraces causes of action, "For personal injuries, except libel," etc.; and both of the causes of action in the present complaint clearly come under this subdivision. This section also provides at its close that, "it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section," and "*that they are consistent with each other.*" The last clause, requiring that such causes of action be consistent with each other, was first added to the new Code of 1877.

The demurrer to the second cause of action, on the ground that it did not state facts sufficient to constitute a cause of action, is based upon the contention of the defendant, that an action for malicious prosecution cannot be maintained, except upon a legal and *valid* judicial proceeding; that it will not lie upon proceedings void for want of jurisdiction; that the complaint must allege or show such a valid judicial proceeding; and that the second cause of action is, in this respect, defective, in not alleging either in general words that the Commissioner had jurisdiction, or in showing any facts sufficient to authorize the issuing of the warrant of arrest.

The demurrer to the whole complaint, for the improper joinder of the two causes of action, is based upon the

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contention that an action for false imprisonment and for malicious prosecution cannot both be maintained upon the same identical proceedings and arrest ; that the former is based upon a want of jurisdiction, and the latter upon a valid legal proceeding ; and that, if the statement of the second cause of action be held sufficient in averring or showing jurisdiction in the commissioner who issued the warrant for the arrest, then it is *inconsistent* with the first cause of action, which is based expressly upon the want of jurisdiction ; and, therefore, that the joinder of these two causes of action in one complaint is forbidden by section 484 above referred to.

[²] The remedy at common law for false imprisonment is by an action of *trespass* for a *direct* injury to the plaintiff through an unlawful arrest, or a detention without legal authority. The arrest or detention [³] may be by process under color of legal proceedings, or without process, in the absence of any legal proceedings, or it may be through the irregular issuing or service of process in proceedings otherwise valid, *Addison on Torts* (*Wood's Ed.*), §§ 798, 802, 803, 831 ; *Barker v. Braham*, 2 *W. Bl.* *866 ; *Parsons v. Lloyd*, *Id.* *845 ; *Holley v. Mix*, 3 *Wend.* 350 ; *Pease v. Burt*, 3 *Day*, 485.

[⁴] The common law remedy for a malicious prosecution, on the other hand, is by an action on the *case* for an *indirect* injury through the institution of legal proceedings from malicious motives and without probable cause. To recover in such an action, not only must malice and the absence of probable cause be shown, but also the termination of the legal proceedings in favor of the accused ; none of which are essential to recovery in an action of *trespass* for false [⁵] imprisonment. The gist of the action is the malice and want of probable cause ; and where these con-

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cur, and the accused has been acquitted, the law, by means of this remedy, designs to afford him compensation for the injury, expense, annoyance, or disgrace of the groundless proceedings against him, *Addison on Torts* (*Wood's Ed.*), §§ 852-868.

[¶] Where the proceedings are void for want of jurisdiction, trespass for false imprisonment is the ordinary remedy, since no other proof is requisite than the proof of the arrest or detention, and of the illegality of the proceedings. Upon this proof, the plaintiff is entitled to compensatory damages (*Jay v. Almy*, 1 *W. & M.* 262; *Blythe v. Tompkins*, 2 *Abb. Pr.* 468); and where there is also evidence of malice, or bad faith, or want of probable cause, exemplary damages may also be given, but not otherwise, *Addison on Torts* (*Wood's Ed.*), § 845; *Day v. Woodworth*, 13 *How.*, *U. S.*, 363, 371; *Brown v. Chadsey*, 39 *Barb.* 253, 265; *Williams v. Garrett*, 12 *How. Pr.* 456.

[¶] Where the arrest complained of arose in the course of legal proceedings, and there was no doubt of malice and of the want of probable cause, and no question existed concerning the jurisdiction or legal validity of the proceedings themselves, the pleader was necessarily confined to an action on the case for

[¶] malicious prosecution. While, if a doubt existed with regard to the jurisdiction of the court or magistrate in issuing the warrant of arrest, or the regularity of the proceedings under it, the pleader would ordinarily insert also a count in trespass for false imprisonment, so that, upon trial, if the proceedings were held irregular, he would be entitled to recover compensatory damages at all events; and, on proof of malice and want of probable cause, he could recover full damages for the malicious prosecution, in case the proceedings and the arrest should be held to be regular and within

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the jurisdiction of the court or magistrate that issued the warrant.

[⁹] While thus, from reasons of convenience, the remedy for an arrest without jurisdiction was ordinarily by an action of trespass for false imprisonment, and the remedy was by an action on the case for malicious prosecution, where the arrest was in the course of a lawful prosecution, yet these remedies were not confined within these several limitations, nor were they

[¹⁰] always mutually exclusive of each other. Though the process and proceedings were perfectly valid and regular, yet, in case of their abuse or misuse, or service at an unlawful time, an action for false imprisonment would still lie, Holley *v.* Mix, 3 *Wend.* 350; Doyle *v.* Russell, 30 *Barb.* 300, 305; Johnson *v.* Sutton, 1 *Term*, 510, 536, 537; Pease *v.* Burt, 3 *Day*, 485.

[¹¹] By the Revised Statutes of this State (2 *Rev. Stat.* 553, § 16), it is provided : "Where by the wrongful act of any person, an injury is produced either to the person, personal property, or rights of another, * * * for which an action of trespass may by law be brought, an action of trespass on the case may be brought to recover damages for such injury, whether it was willful, or accompanied by force or not; and whether such injury was a direct and immediate consequence from such wrongful act, or whether it was consequential and indirect." This provision is not affected by the

[¹²] Code of Civil Procedure. The necessary effect of it would seem to be, to authorize an action on the case for a malicious prosecution, where malice and the want of probable cause appear, even though the want of jurisdiction in the proceedings for the arrest also expressly appear; since an action of trespass for false imprisonment would, in the latter case, undoubtedly lie; and in all such cases, therefore, the party injured has his election of remedies under this statute, Rice *v.*

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Platt, 3 *Denio*, 81, 84; Wright v. Wilcox, 19 *Wend.* 343-348; Shorke v. Charles, 18 *Wend.* 616.

Aside from this statutory provision, upon an examination of the authorities cited in the elaborate briefs which have been submitted to me by the counsel of [¹³] the respective parties in this case, I am satisfied that the great preponderance of authority, not only in this State, but in this country generally, as well as in England, is to the effect that an action for malicious prosecution will lie against the person upon whose complaint the warrant was issued, though the proceedings were irregular and without jurisdiction, provided the subject-matter, the offense, and the person, were within the magistrate's jurisdiction. It is so stated expressly in the text writers, and has been repeatedly adjudged, 3 *Black. Com.* *127; 2 *Greenleaf on Ev.* § 449; 1 *Chit. on Pl.* *133.

[¹⁴] The precise question here presented arose in the case of *Morris v. Scott*, in this State (21 *Wend.* 281), when, in an action on the case for malicious prosecution, the plaintiff was nonsuited on the trial because it did not appear in the declaration that the justice before whom the complaint was made, and who had issued his warrant for the arrest of the plaintiff, had jurisdiction in the matter charged.

Upon error to the supreme court, the judgment was reversed, the court holding, that an action might be maintained "though there may be a total want of jurisdiction, provided the *malice and falsehood* be put forward as the *gravamen*, and the arrest or other act of [¹⁵] trespass be claimed as the consequence." The authority of this case has not been shaken, but reaffirmed by subsequent decisions, *Newfield v. Copperman*, 47 *How. Pr.* 87; *Thaule v. Krekeler*, 81 *N. Y.* 428; *Dennis v. Ryan*, 63 *Barb.* 145; *Von Latham v. Libby*, 38 *Barb.* 339; *Dennis v. Ryan*, 65 *N. Y.* 385.

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In the case last cited [Dennis *v.* Ryan], the defendant had been charged with forgery, accompanied by such facts and circumstances as showed that the offense was not forgery in law, and, upon trial of the indictment, he was acquitted upon that ground. In a subsequent trial for malicious prosecution, the judge charged that the action would lie, "if the defendant knew that the charge was false and unfounded, and by that means procured the plaintiff to be indicted and brought to trial, even though the charge made did not constitute the crime alleged, or any crime," and this charge was [¹⁶] sustained on appeal. The same principle has been affirmed in numerous other cases in this country, Stone *v.* Stevens, 12 Conn. 219; Hayes *v.* Younglove, 7 *B. Mun.* 545; Stancliff *v.* Palmeter, 18 *Ind.* 321; Stocking *v.* Howard, 73 *Mo.* 25, S. C., 24 *Alb. L. J.* 537; Sweet *v.* Negus, 30 *Mich.* 406; Collins *v.* Love, 7 *Blackf.* 416; Forest *v.* Collier, 20 *Ala.* 175; Braveboy *v.* Cockfield, 2 *McMullen*, 270; Gibbs *v.* Ames, 119 *Mass.* 60.

In support of the proposition that an action for malicious prosecution will not lie, except upon valid legal proceedings, the defendant relies upon the [¹⁷] recent case of Nebenzahl *v.* Townsend, decided in the New York common pleas (61 *How. Pr.* 353), on several cases in Massachusetts (Bixby *v.* Bundige, 2 *Gray.* 129; Whiting *v.* Johnson, 6 *Gray.* 246; Bodwell *v.* Osgood, 3 *Pick.* 379, 383), and on some others of a similar character. In the case in the common pleas the point was referred to briefly, but, at the close of the paragraph, the learned chief judge says, "the point is not material from what subsequently occurred." The case has not, therefore, the weight of an expressive adjudication. In Bixby *v.* Bundige, the decision was upon the express ground that the justice had "no jurisdiction of the offense," and the fact was the same in both the other Massachusetts cases. These cases, there-

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fore, are not in point as respects a court or magistrate that has jurisdiction of the subject-matter, of the offense charged, and of the parties. The same point was held in the case of *Painter v. Ives* (4 *Neb.* 122), and in *Sweet v. Negus*, 30 *Mich.* 406. In the former case, LAKE, Ch. J., said, this seems to be the correct rule where the proceedings complained of were had in a court having no jurisdiction of the subject-matter of the suit. In the latter case, CHRISTIANCY, J., says: "There may be good ground for holding, as has been held in some cases, * * * that when the justice has, by law, no jurisdiction of the subject-matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings cannot properly be called a prosecution. In such cases, the accused would be under no obligation to obey or submit to the arrest, or the trial or examination. We decide nothing upon this point, as it is not before us; but we are entirely satisfied that when the want of jurisdiction does not appear upon the face of the warrant, and is only to be shown by evidence *aliunde*, the party arrested and prosecuted may, when he has been acquitted, maintain an action for malicious prosecution, when he shows it to have been malicious, and the prosecution does not show in defense that there was probable cause, and that he acted in good faith."

In Massachusetts, also, in the more recent case of *Gibbs v. Ames* (119 *Mass.* 60), the decision of the court is to the same effect; where a plaintiff was brought to trial and acquitted, but without any previous proper complaint or proper warrant of arrest, and it was held that an action for malicious prosecution would lie; the court say: "This was a sufficient prosecution and acquittal therefrom to furnish a foundation for the common action for malicious prosecution, notwithstanding any insufficiency of the complaint, or defect of

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process by which she was brought before the court, or want of jurisdiction of the magistrate arising from such defect. * * * *The magistrate had jurisdiction of the subject-matter of the complaint*, which was not the case in *Bixby v. Brundige*, 2 *Gray*, 129, and *Whiting v. Johnson*, 6 *Gray*, 246."

[¹⁸] In England, it can hardly be said that any other rule has ever prevailed as against a prosecutor who has maliciously procured an illegal warrant of arrest to be issued upon a groundless charge; although the magistrate who maliciously issues it without jurisdiction is liable in trespass only, since he is the *direct cause* of the arrest (*Morgan v. Hughes*, 2 *Term*, 225, 231), while the complainant was but the *indirect cause*. Blackstone (3 *Com.* *127), says: "But an

[¹⁹] action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation and expense, upon which this action is founded." (*Goslin v. Wilcock*, 2 *Wilson*, 302, 307; *West v. Smallwood*, 3 *Mees. & W.* 418, 420; *Wicks v. Fenthams*, 4 *Term*, 247; *Pippet v. Hearn*, 5 *Barn. & Ald.* 634). In the late case of *Farley v. Danks* (4 *El. & Bl.* 493), the defendant had falsely and maliciously procured the plaintiff to be adjudicated a bankrupt, upon an affidavit which was not sufficient, legally, to warrant an adjudication. Lord CAMPBELL, in support of a verdict, says: "It is said that the adjudication ought to be a consequence necessarily and legally following from the facts, if true. But all that is necessary is, that the defendant should falsely and maliciously cause the act; and he does that when he swears falsely, and the act would not be done without his so swearing. It would be monstrous to say that this does not make

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out the charge: I should be very sorry to find any decisions of our courts to that effect. Where a man makes a true statement of fact, upon which the court acts wrongly, the grievance, it is true, arises, not from the statement, but from the judgment; but it would be monstrous to hold that this is so where the statement is maliciously false. We must assume that Oldfield v. Dodd (8 *Exch.* 578) is correctly decided; though, for anything I know, it may be reversed in the House of Lords. But it does not show that this action will not lie; it shows only that the commissioner made a mistake; he did not the less act on the authority of the defendant. Suppose an application to be made to hold a man to bail upon affidavit that he is going to leave the country, which is utterly without foundation of fact, and that some slip is made, as Mr. Gray suggests, in point of law, it is clear that, under these circumstances, a party would be liable for a malicious falsehood. The action, therefore, well lies, and the rule must be discharged."

[²⁰] Upon these authorities, it would seem to be clear that, whatever doubt may exist in regard to the propriety of an action for malicious prosecution where the court or magistrate issuing the warrant was wholly without jurisdiction of the subject-matter, or of the offense charged, the nearly unanimous decisions of the courts are, that such an action will lie against the prosecutor who has maliciously set on foot legal proceedings, though invalid, before a tribunal of competent jurisdiction; and such is this case. The defendant, according to the averments of the second cause of action demurred to, maliciously, and without probable cause, procured the plaintiff's arrest upon a charge of forgery, through a warrant which he procured to be issued from a commissioner of the circuit court of this district. The magistrate was competent to entertain the charge; the

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offense was within the provisions of the treaty ; the proceedings may have been irregular and invalid, but they were within the general scope of his jurisdiction ; [21] and these proceedings having been set on foot, maliciously, and without probable cause, and the plaintiff's arrest procured through the defendant's agency therein, it does not lie in his mouth to insist that the proceedings were defective.

The demurrer to the second cause of action, should, therefore, be overruled.

[22] *Second.* In the above view of the second cause of action, it is not necessarily inconsistent with the action of trespass for false imprisonment stated in the first cause of action, inasmuch as if the proceedings on the warrant for the arrest should be found to be irregular and void, either action would, in this case, lie, by reason of the general jurisdiction of the commissioner over the subject-matter ; and this would be the case although it appeared that both causes of action were upon one and the same proceeding and arrest, *Barr v. Shaw*, 10 Hun, 580. This fact does not appear upon the complaint in this case, however probable it may be. In the theory of pleading, different counts are supposed to represent different claims or offenses. It is not impossible that the plaintiff may have been arrested by the defendant's procurement upon the same day upon two different charges, and by two different warrants of arrest, and the subsequent proceedings might, possibly, have been had under both. It is not impossible that a prior proceeding may have been thought of doubtful sufficiency, and a second have followed upon the same day, designed to avoid any [23] defects of the first. Nothing in the complaint shows that both counts are for the same arrest, and it cannot, upon demurrer, be taken for granted.

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On both grounds, therefore, the demurrer to the whole complaint should be overruled.

The defendant may answer within twenty days, on payment of the costs of the demurrer.

BERNARD v. MORRISON.*

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM ;
OCTOBER, 1882.

§§ 487, 488, 492.

Election of answer or demurrer.—When paper served as answer is both answer and demurrer, defendant must elect upon which he will rely.—If he rely upon demurrer, answer disappears from the case.—Same cause of action cannot be both answered and demurred to.

Where the complaint contains but one cause of action, and the paper served as an answer is clearly both an answer and a demurrer, the defendant may, on motion, be compelled to elect whether he will abide by it as an answer or as a demurrer.

On such a motion, there is no necessity to determine that if the defendant elect to regard the paper served as an answer, then it should be made more definite and certain ; for if the defendant elect to abide by it as a demurrer, the answer will disappear from the case.

A defendant cannot both answer and demur to the same cause of action.

Motion by plaintiff to compel the defendant to elect whether he would abide by a paper served as an answer to the amended complaint, as an answer, or as a demurrer ; and if defendant should elect to abide by it as an answer, then, that such parts of it as constituted a demurrer be stricken out, and that as an answer it be made more definite and certain ; and if the defendant should elect to abide by it as a demurrer, then, that such

* An appeal by defendant to the general term, is pending.

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parts of it as did not constitute a demurrer be stricken out.

The amended complaint contained one cause of action, to recover money lost at play.

The paper served as an answer to the amended complaint set forth various defenses and denials, and concluded as follows: "Fourth. And as a further and distinct defense to the matters set forth in the amended complaint, the defendant avers: That it does not state facts sufficient to constitute a cause of action."

"That no cause of action has accrued to the plaintiff against the defendant, as alleged in the amended complaint, or of any kind or nature whatsoever;" and prayed for a dismissal of the complaint.

E. J. Myers (A. H. Nones, attorney), for plaintiff:

Cited as to the right to compel the election, Spellman v. Werder, 5 *How.* 5; Slack v. Heath, 1 *Abb.* 331, 337; Struver v. Ins. Co., 16 *How.* 422; Howard v. R. R. Co., 5 *Id.* 206; Petree v. Lansing, 66 *Barb.* 358; Gleason v. Youmans, 9 *Abb.*, *N. C.*, 108; People v. Comm'rs, 54 *N. Y.* 276; Mills v. Gould, 1 *Abb.*, *N. C.*, 93, 97.

John Graham (Geo. Owen, attorney), for defendant.

POTTER, J.—This is a motion to compel this defendant to elect whether he will abide by his answer or demurrer.

The paper served as an answer to the amended complaint is clearly an answer and a demurrer. (See paragraph 4, fol. 8.) It is in the words of subd. 8, sec. 488. Where there is but one cause of action, the defendant may answer or demur, but he may not answer and demur to the same (secs. 487 and 492).

The remedy to compel an election in such case is proper (sec. 492 Code, and the numerous cases in the references in Bliss' Code under sec. 492.)

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There is no occasion or propriety to pass upon the various objections made to defendant's answer for want of certainty, etc., if defendant elects to stand on his answer; for it may be that he will elect to abide by his demurrer, and, in that event, his answer will disappear from the case.

Motion to compel election granted, with ten dollars costs of motion.

MARTIN v. RECTOR.

SUPREME COURT, THIRD DEPARTMENT, ALBANY
COUNTY SPECIAL TERM; MAY, 1882.

§§ 1525, 1526, 1529.

Restoration to possession in actions of ejectment.—Defendant cannot enter a judgment for, on a verdict in his favor, when new trial granted on appeal.—To entitle defendant to enter a judgment for, new trial must have been granted under the statute.—Remedy when defendant recovers a final judgment on a new trial granted otherwise than under the statute.

A defendant in an action of ejectment, who has been evicted by virtue of a judgment in favor of the plaintiff, cannot, where a new trial has been granted to him on appeal from such judgment, but no provision as to restoration has been made by the appellate court, and he recovers a verdict upon such new trial, enter a formal judgment of restitution upon such verdict, without an order of the court allowing it.^[1, 2]

Under section 1529 of the Code of Civil Procedure, where the plaintiff in an action of ejectment has taken possession of real property by virtue of a final judgment, the defendant on a new trial, if he recover a final judgment, cannot, under such judgment, have an award of restitution to possession, unless the new trial was granted under sections 1525 or 1526 of the Code.^[1, 2, 3] * Where the defendant succeeds upon a

* As to the practice in granting new trials in actions of ejectment, on application to the court, and retention of possession by the defendant, see Post v. Moran, 1 Civ. Pro. R. (1 McCarty), 223.

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new trial, granted otherwise than according to the statute, his remedy is to apply to the court for relief; and he cannot, without an express order authorizing it, enter a judgment awarding restitution.^[19] The provisions of 2 R. S. 309, 310, §§ 37, 38, 41, for which sections 1525, 1526, 1529 of the Code of Civil Procedure are substitutes, discussed.^[1, 2, 3, 7, 8]

Motion by the plaintiff in an action of ejectment, and by the occupant of the premises, to amend the judgment roll, by striking therefrom a clause awarding restitution of possession to the defendant, and for an order restoring the occupant to possession.

The opinion sufficiently states the facts.

Samuel Hand, for plaintiff and motion.

Eugene Burlingame, for occupant and motion.

Geo. W. Miller, for defendant and opposed.

WESTBROOK, J.—This action was brought to recover possession of certain real estate, situate in the county of Rensselaer. Upon the first trial of such action, the plaintiff succeeded; and, by virtue of the judgment entered, the plaintiff was, by execution, placed in possession of the property.

The judgment, however, was reversed at general term,* upon an appeal, and a new trial granted, but there was no order made for the restoration to the defendant, of the property from which he had been evicted.

The action was retried at the Rensselaer circuit, in February, 1882, Justice INGALLS presiding, and resulted in a verdict for the defendant. The charge, however, of the judge presiding at the trial, shows it was held, as matter of law, that the plaintiff was entitled to recover, provided the defendant was the actual occupant of the

* See Martin *v.* Rector, 24 Hun, 27.

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premises sought to be recovered at the time of the commencement of the suit.

Without any order of the court allowing it, the defendant has, upon the verdict, not only entered a judgment for costs, but has also inserted therein a special clause directing the possession of the premises to be restored to him. By virtue of an execution issued upon such judgment, the defendant has been placed in possession of the property.

The plaintiff now moves (and in such motion one John M. Green, who was the occupant of the premises, and was removed therefrom under the judgment in favor of the defendant, unites), that the order of restoration in such judgment contained should be set aside, and the proceedings thereunder in favor of the defendant vacated and annulled.

[1] The question which the motion involves is, can a defendant who has been evicted from the possession of real estate, by virtue of a judgment in favor of the plaintiff in an action of ejectment, provided a new trial is granted in such action upon an appeal, and he succeeds upon such new trial, enter a formal judgment of restitution upon such verdict, without any order of the court allowing it?

If the question just stated must be answered in the affirmative, then this case presents the singular spectacle of a person who is not the owner of real estate placed in the possession thereof, as against the true owner; and the still stranger spectacle, if that be possible, of an individual who succeeds in an action upon the sole ground that he was not the occupant of the property sought to be recovered thereby, at the time of its commencement, placed in possession of such property, which he never before held, and the right [2] to occupy which his defense disclaimed. A stronger case for the interposition of the court cannot well

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be imagined, and it forcibly presents the danger of permitting a judgment of restitution to be entered without a formal application to the court. The defendant, however, insists that the judgment is authorized, and an examination of such claim will be made.

It is true, as the counsel for the defendant contends, that section 1189 of the Code provides that, "Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment, in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law." But this leaves the question open. What judgment does the law permit to be entered upon such verdict?

Section 1529 of the Code declares: "Where the plaintiff has taken possession of real property, by virtue of a final judgment, his possession shall not be in any way affected by the vacating of the judgment, except as prescribed in sections 1525 or 1526 of this act. In such a case, if the defendant thereafter recovers final judgment in the action, it must award to him the restitution of the possession of the property; and he may have an execution thereupon for the delivery of the possession to him, as if he was plaintiff."^[1] What does this section mean? Do the words "in such a case" refer to all cases in which "the plaintiff has taken possession of real property by virtue of a final judgment," without regard to the mode of obtaining a new trial; or do [2] they refer only to those actions in which a new trial has been obtained, not by appeal, but by special application to the court, as provided in sections 1525 and 1526?

[1] Sections 1525 and 1526 of the Code are (see Mr. Throop's notes to such sections), though somewhat changed, substitutes for sections 37 and 38 of the Revised Statutes (2 *Edmond's Statutes*, 318), and section 1529

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of the Code (see Mr. Throop's note) for section 41 of the Revised Statutes (2 *Edmonds' Statutes*, 319). Section 41 of the Revised Statutes declared: "If the plaintiff shall have taken possession of the premises, by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover in any new trial hereby authorized, he shall be

[¶] entitled to a writ of possession, in the same manner as if he was plaintiff." The mode of vacating a judgment provided by the statute to which reference is made by the section just quoted, was not a vacation by appeal, but upon an application to the court as prescribed by sections 37 and 38. The effect of section 41 was clearly, then, to take from the court the power of awarding restitution to the defendant, when a new trial was given under the statute, and to make such restitution a right, without a motion, when after the new trial had been granted, the defendant was successful upon such "new trial."

[¶] In *Huntington v. Forkson* (7 *Hill*, 195), the supreme court had construed the meaning of the words, "if the defendant recover in any new trial," used in section 41. Of them, in that case, Judge BRONSON (see pages 196, 197) had said: "Although the words are, that the defendant shall have a writ of possession if he 'recover in any new trial,' I am strongly inclined to the opinion that the legislature intended the possession should be restored whenever the defendant should obtain a regular judgment in his favor, whether upon a trial, or in any other way."

The decision to which reference has just been made, makes the meaning of the Revised Statutes clear.

[¶] Section 41 thereof provided for a restitution of the premises to a defendant who had been deprived of the possession thereof by a judgment in favor of the

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plaintiff in an action of ejectment, in case he had final judgment in his favor, after a new trial had been granted to him under the statute, and not upon appeal.

[⁸] By his note to section 1529 of the Code, its author Mr. Throop, has declared its meaning to be identical with that of the old Revised Statutes, as interpreted by the case above referred to. He says: "Section 41 of the R. S., amended so as to authorize an execution in behalf of the defendant, upon a recovery by him, in other cases, as well as upon a new trial, in accordance with the opinion of BRONSON, Ch. J., as to a writ of possession, in Huntington v. Forkson, 7 Hill, 195." As the Revised Statutes (section 41) provided for the entry of a judgment of restitution to the defendant in an action of ejectment, when he was successful, only in a case in which a new trial had been granted upon a

special application to the court in accordance with

[⁹] its provisions, it follows that the Code by its 1529th section, which was enacted to carry out the provision of the Revised Statutes, as interpreted by Huntington v. Forkson, did not authorize the judgment entered in this action. The court had interpreted the words "if the defendant recover in any new trial hereby authorized," used in the Revised Statutes to mean, "whenever the defendant should obtain a regular judgment in his favor, whether upon a trial or in any other way," and Mr. Throop has, in section 1529 of his Code, substituted for the words used in the Revised Statutes the words, "if the defendant thereafter recovers final judgment in the action." The change made is clearly in harmony with the note of Mr. Throop, and leaves no doubt as to the meaning.

To the argument already made as to the meaning of section 1529 of the Code, there is another, and it is this, that by other sections of the Code provision is made for a case like the present. By section 1005 is conferred

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the power to award restitution, when a new trial is granted upon a case with exceptions; by section 1292, "when a judgment is set aside for any cause, upon motion;" and by section 1323, "where a final judgment or order is reversed or modified, upon appeal."

[¹⁰] As a new trial had been granted in this action upon an appeal, the defendant's remedy was to apply to the court for relief, and he could not, without an express order authorizing it, enter the judgment of restitution.

The judgment must be modified and amended, as sought by this motion, and an order entered directing the sheriff to restore the possession to the party who had been evicted. This order must be, however, without prejudice to the right of the defendant to move for such relief as he may conceive himself entitled to.

The form of the order will be settled on notice to the defendant's attorney.

BATES ET AL., RESPONDENTS, v. PLONSKY ET AL.
APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
MAY, 1882.

§§ 604, 649.

Levy under warrant of attachment.—Upon what property may be made, although title has been fraudulently transferred.—When attaching creditor can maintain action to set aside fraudulent prior liens upon attached property, before determination of action wherein attachment was granted.—Injunction may be granted in such action, to enjoin receipt of proceeds realized from fraudulent executions and levy upon the attached property.

The provision of the Code of Civil Procedure (subd. 2 of § 649) in relation to the manner of making a levy, under a warrant of attachment, upon personal property capable of manual delivery, is so general in its character as to include no exception; and, although the title to

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such property may have been fraudulently transferred, the property is still subject to levy the same as though the title remained unquestioned in the debtor [1]

A plaintiff, whose attachment has been actually levied upon personal property capable of manual delivery, may, upon the basis of the lien thereby created and to secure its priority, maintain, before the determination of the action wherein the attachment was granted, an action to set aside as fraudulent a general assignment of the debtor's property for the benefit of creditors, judgments entered against him and executions issued thereon, and levies thereby made upon the attached property, although such assignment, entry of judgments, executions and levies thereunder were made previous to the granting and execution of the plaintiffs' attachment. And an injunction enjoining the judgment creditors of the debtor, defendants in the action, from receiving the proceeds realized from levies upon the attached property, under such executions, may be granted during the pendency of the action. [1, 2, 3]

(Decided October 27, 1882.)

Appeal by defendants from an order of the special term, continuing a temporary injunction during the pendency of the action.

On December 13, 1881, one of the defendants, Samuel Plonsky, a dealer in boots and shoes, made a general assignment for the benefit of creditors, giving preferences to three of the other defendants. On December 23, 1881, he confessed judgments in favor of such preferred creditors for the amounts of their several preferences, and executions on such judgments were, on that day, issued to the sheriff, who forthwith levied upon the stock in trade and fixtures of the defendant Plonsky, then in the hands of the assignee, and was indemnified by the judgment creditors against the claim of the assignee.

On December 24, 1881, the plaintiffs commenced an action against the said Samuel Plonsky, to recover upon debt, and obtained an attachment against the property of the defendant, under which the sheriff, on December 24, 1881, levied upon the stock in trade and fixtures, which had previously been levied upon by him in virtue of the executions issued upon the confessed judgments.

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The plaintiffs thereupon, and before the determination of the action in which such attachment had been granted, began this action against the said Samuel Plonsky, the assignee, and the preferred creditors, to set aside the general assignment, the confessed judgments, the executions issued thereon and levies thereby made, upon the ground that they were fraudulent and void, and the result of a conspiracy entered into by all the parties for the purpose of defrauding the plaintiffs, and to delay and render of no avail the lien of their attachment; and it was shown that the executions issued upon the confessed judgments being prior to the plaintiffs' attachment, the sheriff was about to sell the property to satisfy the executions. The complaint prayed for the canceling and removal of the liens created by the assignment, the confessed judgments, and the executions, and that the sheriff be enjoined and restrained from paying over, and the defendants from receiving, the amount realized upon the executions, and that the same be deposited by the sheriff with the chamberlain of the city of New York, to be by him held to await the determination of the action, subject to the lien of the plaintiffs' attachment, and to be applied to the satisfaction of any judgment which the plaintiffs might recover in their first action.

The plaintiffs obtained a temporary injunction, with an order to show cause why it should not be continued during the pendency of the action. Upon the hearing of the order to show cause, the injunction was continued, and the sheriff was directed to deposit with the chamberlain the amount realized upon the executions.

The further facts are sufficiently stated in the opinion.

Otto Horwitz, for appellants:

A mere attaching creditor cannot maintain such an action as the present. If it had been brought simply to attack the judgments as specific liens upon the specific

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property attached, and no question as to the legal title of a third party to the attached and other property intervened, and remained to be removed, then the right of the attaching creditor to bring the action might not be so easily disproved ; although, even in that case, the right is very questionable. But this is distinctively an action by which the attaching creditor seeks to reach equitable assets, claiming them to be the property of his debtor, who has, however, given the legal title thereto to a third person by an alleged fraudulent transfer, which transfer includes the very property on which the plaintiffs claim to have a specific lien, and which transfer they seek by this action to annul so that the property may be decreed to be that of the debtor, and under the lien of the attachment. The action cannot be maintained in its present form, and the assignee should not have been made a party ; a creditor's bill is the plaintiffs' proper remedy. *Thurber v. Blanck*, 50 N. Y. 80 ; *Lynch v. Creary*, 52 N. Y. 181, 183 ; *Smith v. Longmire*, 24 Hun, 257 ; *Conner v. Weber*, 12 Id. 580, 584 ; *O'Brien v. Mechanics'*, etc., Ins. Co., 14 Abb., N. S., 314, 319 ; *Kelley v. Lane*, 42 Barb. 594, 612, dissenting opinion of SUTHERLAND, J., which is not at variance with the prevailing opinion on this point.

Blumenstiel & Hirsch, for respondents :

Cited as to the right to maintain the action, *Rinchey v. Stryker*, 28 N. Y. 45 ; *Falconer v. Freeman*, 4 Sand. Ch. 565 ; *Thayer v. Willett*, 5 Bosw. 344 ; *Kelly v. Lane*, 42 Barb. 594, 608 ; *Thurber v. Blanck*, 50 N. Y. 80 ; *Frost v. Mott*, 34 N. Y. 253 ; *Greenleaf v. Mumford*, 19 Abb. 469 ; *Wehle v. Cinner*, 83 N. Y. 231 ; *Beards v. Wheeler*, 76 N. Y. 213 ; *Miller v. Earle*, 24 Id. 110 ; *Dunham v. Waterman*, 17 Id. 9, 15 ; and as to the right to make all the parties defendants, *Boyd v. Hoyt*, 5 Paige, 65 ; *Fellows v. Fellows*, 4 Cow. 682 ; *Brinkerhoff v.*

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Brown, 4 *Johns. Ch.* 671; Hammond *v.* Hudson River Iron, etc., Co., 20 *Barb.* 378, 384; Reed *v.* Stryker, 12 *Abb.* 47; Morton *v.* Weil, 11 *Abb.* 421; Newbold *v.* Wanin, 14 *Abb.* 80; Jacot *v.* Boyle, 18 *How.* 106; Getty *v.* Devlin, 70 *N. Y.* 504.

Section 604 of the Code provides for the granting of an injunction in such a case as the present.

By the Court.—DANIELS, J.—The action has been brought to secure the priority of the plaintiff's rights under attachments issued against the defendant, Samuel Plonsky, over an assignment executed by him for the benefit of his creditors, and over executions issued upon judgments confessed by him in favor of other of the defendants. The attachments issued on behalf of, and for, the plaintiffs were levied upon the stock in trade of boots, shoes and fixtures of the debtor, and the executions upon the confessed judgments were also levied upon the same property. These judgments, as well as the general assignment, are alleged to have been made and entered with the intent to hinder, delay or defraud the creditors of the debtor. And for that reason, the plaintiffs claim priority over the general assignee, and the creditors in the judgment confessed, although their attachments were afterwards, in point of time, levied upon the property. Whether such an action can be maintained by them under the circumstances, is the point upon which the appeal has been placed in the argument. It is entirely clear, that no such suit could be maintained for the vindication and establishment of the rights of the attaching creditors, if the property seized under the attachment had not been of a tangible nature, Smith *v.* Longmire, 24 *Hun.*, 257. This disability results from the circumstances that such property, after having been assigned or transferred, even though that may have been done fraudulently, cannot be made subject to an

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attachment as long as such transfer remains in [1] force. But, where the property is not of that character, but is capable of being taken into the manual possession of the sheriff, there this disability does not exist.

Notwithstanding the fraudulent transfer, such property may still be seized by virtue of the attachment. And the propriety of the seizure may be sustained, when that is brought in question, by showing that the transfer itself was fraudulent and inoperative as against creditors. This right to assail such a disposition of the debtor's property results from the fact that the creditor is entitled to have it seized by virtue of his attachment, and after that to maintain the propriety of such a seizure of it. The Code has provided that the levy may be made upon property capable of manual delivery by taking the same into the sheriff's actual custody, [2] *Code Civ. Pro.* § 649, subd. 2. This provision is so general in its character as to include no exception; and, consequently, property, the title to which may have been fraudulently transferred, may be made the subject of the seizure the same as though it remained unquestionably in the debtor. To render such a seizure entirely effectual, the creditor may show in vindication of it, that while the title to the property had been, in form, transferred, that it was done to defraud creditors, and in that manner avoid and annul it, *Thurber v. Blanck*, 50 N. Y. 80; *Frost v. Mott*, 34 *Id.* 253. This case has been brought within this principle, for the complaint shows an actual attachment of the property, and that it was all property which could be taken into the [3] manual possession of the officer. Upon the basis of the lien created in that manner, no good reason seems to stand in the way of an action of this nature, brought to establish the right of the attaching creditors to appropriate it through the instrumentality of the

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attachments, to the payment of any judgments they may recover in the action; and that really is all that

is intended to be accomplished by the present suit.
[¶] The injunction extends no further than to protect

the creditors' rights during the pendency of the action, in case they shall ultimately appear to be entitled to this relief. For it simply, in the meantime, restrains the payment of any of the proceeds of the property of the debtor to the defendants, or either of them, upon the executions issued to collect the judgments confessed by the debtor, and it included only the property seized by virtue of the plaintiffs' attachments. Even this restraint is more formal than real, for the reason that the direction given to the sheriff requiring him to deposit with the chamberlain the amount of such proceeds, subject to the final determination of this action, would practically accomplish the same result. And such an order as that would, very much as a matter of course, have been made upon a mere motion, where a contest of this nature existed as to the right to the proceeds between the several parties proceeding against this property. The appeals taken from the order cannot be sustained, but it should be affirmed, with \$10 costs, besides the disbursements.

BRADY and **BARKER, JJ.**, concurred.

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KOSTER AND ANO. v. VAN SCHAICK ET AL.

N. Y. COMMON PLEAS, SPECIAL TERM; OCTOBER, 1882.

§§ 2233, 2254, 2262, 2265.

Forcible entry and detainer. — Proceedings for, conform to summary proceedings. — When execution of warrant in, cannot be enjoined by injunction, pending appeal. — Injunctions in summary proceedings, upon what allegations dependent. — In what case the Code expressly provides that warrant may be stayed pending appeal.

By section 2233 of the Code, proceedings for forcible entry and detainer are made to conform to summary proceedings to recover the possession of real property.^[1]

The language of subd. 2 of section 2265 does not give the court any general power to enjoin the execution of a warrant in summary proceedings, pending appeal; but simply provides that an injunction may be granted in a case where it would be granted to stay the execution of the final judgment in an action of ejectment. This is merely declaratory of an equitable jurisdiction which has long been exercised; but which depends upon the allegations of fraud, or collusion, or the want of jurisdiction.*^[2]

Where there is no claim that proceedings for forcible entry and detainer were fraudulent, or that the magistrate acted without jurisdiction, the court has no power to grant an injunction restraining the execution of the warrant, pending appeal from the final order under which such warrant was issued, merely on the ground that the magistrate has committed errors in the proceeding which rendered it void,^[3] [4] such errors may be reviewed upon appeal.^[5]

The only express provision made by the Code for staying summary proceedings, pending appeal, is in a case where the lessee or tenant holds over after a default in the payment of rent. There is no provision for a stay upon appeal in the case of a tenant holding over after the expiration of his term, nor in the case of forcible entry and detainer, unless it can be found in subd. 1 of section 2265;^[6] [7] and query, whether a judge of the marine court before whom summary proceedings for for-

* See Note on Injunctions in Summary Proceedings, 1 Civ. Pro. R. (1 McCarty), 425.

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cible entry and detainer are tried has power, pending appeal, to stay the execution of the warrant, by order, upon the giving of an undertaking, or otherwise, under subd. 1 of section 2265.* ['] .

Motion by plaintiffs for a temporary injunction to restrain the defendants from executing a warrant in proceedings for forcible entry and detainer, pending an appeal by plaintiffs from the final order under which said warrant was issued, and also to restrain the execution of said warrant during the pendency of this action.

One of the defendants, Alida Van Schaick, was the owner of certain premises situate in the city of New York, which were leased to the plaintiffs in this action. In May, 1882, said Alida Van Schaick began summary proceedings to recover possession of the premises in question, on the ground that the said plaintiffs held over and continued in possession after the expiration of their term, and the final order in such proceedings awarded delivery of possession to her, and a warrant was accordingly issued and executed.

* The earliest case holding that the provisions of the Code of Civil Procedure, in relation to staying the execution of a warrant in summary proceedings, pending appeal, apply only to a case where the tenant holds over after a default in the payment of rent, is *Shaw v. McCarty*, reported in full for the first time, *post*, p. 235. See, to the same effect, *Knox v. McDonald* (25 Hun, 268, 270); and under the R. S., *Sage v. Harpending*, 49 Barb. 166, S. C. 34 Hous. 1.

The query suggested in *Koster v. Van Schaick, supra*, was involved and decided in *Van Schaick v. Koster*, reported *post*, p. 239, where it was held, on the reasoning of *Shaw v. McCarty, supra*, that the execution of the warrant in proceedings for forcible entry and detainer could not be stayed, pending appeal.

It may be observed, that while a stay of the warrant can be granted, pending appeal, only where the lessee or tenant holds over after a default in the payment of rent, even this exception is, it seems, denied to a lessee or tenant in the city and county of New York.

Section 2262 provides that: "Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or tenant holds over, after a default in the payment of rent,

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Thereafter, in June, 1882, the said Alida Van Schaick, on the ground that the said plaintiffs, after the award of possession to her as aforesaid, had made entry upon said premises, began summary proceedings under section 2233 of the Code as for a forcible entry and detainer. The proceeding came on for trial before McADAM, J., and a jury, and the evidence was conflicting upon the question of actual force, but there was an admission of constructive force, and the said Alida Van Schaick recovered a verdict, and the final order awarded her possession, and a warrant was accordingly issued. The plaintiffs appealed from this final order and applied for a stay of proceedings pending appeal, and offered to give an undertaking to stay the execution of the warrant, but McADAM, J., declined to grant a stay upon the ground that the Code, in such a case, made no provision for a stay of the warrant.

The plaintiffs, upon the ground that the said Alida Van Schaick had, by certain acts, waived her right to

the issuing and execution of the warrant may, *except in the city and county of New York*, be stayed by order of the county judge." * * * Mr. Throop, in a note to section 2262 of his edition of the Code (1881), says: "The remainder of § 52, added to the R. S. by L. 1849, ch. 193 (8 R. S. [5th ed.], 840; 2 Edm., 534). The exception, where the proceedings are taken in New York city, is but declaratory of the existing provision of law, the retention of which is required by circumstances peculiar to that city." * * * And in a note to section 2261 of his edition of the Code (1881), Mr. Throop says: * * * "Under the former statute, it would seem that the decisions of the district courts of New York could be reviewed only by *certiorari*. The last section will transfer the jurisdiction to review them, as in other cases, to the common pleas, and require them to be reviewed by appeal; and the prohibition of a stay, preserved in this section and in § 2265, *post*, which is not affected by the next section, will remove the only serious objection to the change." * * *

The foregoing extracts from Mr. Throop's notes would seem to show, that when he said, "The exception, where the proceedings are taken in New York city, is but declaratory of the existing provision of law," he had in view the act of 1849, chap. 193, § 5, adding to article 2, title 10, chap. 8, part 8 of the R. S. three additional sections (see 8 R. S. [5th ed.]

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enforce the warrant in the summary proceedings, and that the verdict in the proceedings for forcible entry and detainer was improper, and that the refusal to stay the execution of the warrant in that proceeding was erroneous and would work irreparable injury, thereupon brought this action for an injunction to restrain the execution of said warrant pending appeal and the determination of this action, and moved for a temporary injunction as above stated.

Chas. W. Brooke (L. Ansbacher, attorney), for plaintiffs.

A. H. Stoiber (Van Schaick, Gillender & Stoiber attorneys), for defendants.

VAN BRUNT, J.—This is an application for an injunction to restrain the execution of a warrant issued in a proceeding for forcible entry and detainer, pending an appeal from the judgment entered in said proceeding.

840, §§ *52, *53, *54), and providing that where the proceedings were taken before a justice of the peace, a stay might be granted *on appeal to the county court* (3 R. S. [5 ed.], 840, § *52); that while this act gave at least another mode of review elsewhere, (People *ex rel.* Williams v. Bigelow, 11 How. 88; People *ex. rel.* Van Allen v. Perry, 16 Hun, 461), it did not affect the city and county of New York, where the writ of *certiorari* still remained under 2 R. S. 516, § 47 (People *ex rel.* Nevins v. Willis, 5 Abb. 205; Freeman v. Ogden, 17 Abb. 828, *note*, affirmed 40 N. Y. 105; McIntyre v. Hernandez, 7 Abb., N. S., 214, S. C., 39 How. 121; Romaine v. Kinshimer, 2 Hilt. 519, disapproving Davis v. Hudson, 5 Abb. 68); and that said § 47 contained an express prohibition against a stay pending review by *certiorari*, People *ex rel.* Grisaler v. Fowler, 55 N. Y. 675; Sherman v. Wright, 49 N. Y. 283; Sage v. Harpending, 49 Barb. 172; Smith v. Moffatt, 1 Id. 68; Duigan v. Hogan, 16 How. 167; People *ex rel.* Nevins v. Willis, 5 Abb. 208; People *ex rel.* Williams v. Bigelow, 11 How. 86; Cure v. Crawford, 5 Id. 295; Wordsworth v. Lyon, Id. 464; Launitz v. Dixon, 5 Sandf. 254.

In *McAdam on Landlord and Tenant* (2d. ed.) 666, it is said: "Section 2261 of the Code provides, that the issuing of the warrant cannot be stayed by the appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. The next section (2262) contains no

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It is claimed upon the part of the plaintiffs that, under section 2265, this court has authority to issue such an injunction.

[1] By section 2233, proceedings in cases of forcible entry and detainer are made to conform to summary proceedings for the possession of real property.

An examination of those sections shows that, in many respects, they are but a re-enactment of the provisions of the Revised Statutes. Subdivisions 1, 2 and 3 of section 2254, which provide for the cases in which a party may obtain a stay where a final order is made requiring the delivery of possession of property to the petitioner, are but a re-enactment of sections 44, 45 and 46, pages 515 and 516 of the second volume of the Revised Statutes. Section 47 provides that the supreme court may award a *certiorari* for the purpose of examining any adjudication made upon any application thereby authorized. Instead of *certiorari*, the Code provides for an appeal. The section then provides: "But the proceed-

provision for a stay, except in cases where the judgment is for non-payment of rent, and even in those excepted cases, the provisions in reference to a stay is declared to be inapplicable to the city and county of New York (*Code*, § 2262), so that in that county there can be no stay of the warrant in any case."

We have Mr. Throop's statement that circumstances peculiar to the city of New York, require that tenants in that city should be denied a stay pending appeal, on a state of facts which would secure it in every other county in the State. Except that it previously existed, Mr. Throop omits to state the circumstances which require the city of New York to be invidiously excluded from participating in the relief elsewhere enjoyed. If it were the intent to lessen the rigor of these proceedings, a very slight acquaintance with the practical operation of the law in the city of New York would show that, upon the tenants of no other locality could the right to a stay be conferred with the prospect of mitigating more hardship.

In the marine court alone, for the year ending January 31, 1881, there were about six thousand cases of summary proceedings. This number, taken together with those in the district courts, probably exceeds the number brought throughout the entire remainder of the State.

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ings on any such application shall not be stayed or suspended by such writ of *certiorari*, or any other writ or order of any court or officer." It has been held that the proceedings of a landlord for the removal of the tenant can only be stayed by a court of equity where it is alleged that the proceedings before the justice are fraudulent or collusive, or that the magistrate has no jurisdiction, *Sherman v. Wright*, 49 N. Y. 227, 232. Section 2265 of the Code is but a re-enactment of the latter clause of section 47, and incorporated therein is the law as declared by the decisions of the courts. Section 2265 provides that, "Where a petition is presented, as prescribed in this title, the proceedings thereupon before the final order, and, if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon, cannot be stayed or suspended by any court or judge, except in one of the following methods:

First. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose in this title.

Second. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be

While summary proceedings do not, in their nature, permit of a nice adjustment of rights, and there exists as much necessity for their prompt enforcement in the city of New York as elsewhere, however it may be in respect to other cases wherein such proceedings can be employed, non-payment of rent is not the case in which a landlord in that city would suffer any greater inconvenience by a stay, pending appeal, than a landlord in any other section of the state. Should the privilege of such stay be granted to tenants in the city of New York, not only would it be in accord with what is now the general policy of the law in respect to this particular cause for removal, but it would, in view of the ample security required by § 2262, equalize the rights of tenants throughout the state, without doing injustice to any interests. A large body of suitors might thus be relieved from an exception in the nature of a denial of equal protection, which is liable to work great hardship, and for which there seems to be no real necessity.

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granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, brought by the petitioner, and upon the like terms; or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action, and upon the like terms."

[³] The only provision made by the Code, for a stay of summary proceedings upon appeal, is in the case where the lessee or tenant holds over after a default in the payment of rent. There is no provision for a stay upon an appeal in the case of a tenant holding over after expiration of term, or in the case of forcible entry or detainer, unless it is found in subdivision 1 or 2 of section 2265.

[⁴] The language of subdivision 2 does not give the court any general power to enjoin the execution of a warrant, but simply provides that such injunction may be granted in a case where an injunction would be granted to stay the execution of the final judgment in an action of ejectment, and upon the like terms. This is merely declaratory of an equitable jurisdiction which the courts had long exercised, and which depended upon allegations of fraud or collusion in the proceedings, or that the magistrate had not jurisdiction.

[⁵] There is no pretense in the case at bar of fraud or want of jurisdiction, but simply that the magistrate has committed errors in the proceedings which render them void.

[⁶] Prior to the adoption of the Code, these errors could only be reviewed upon *certiorari*, now they can be reviewed upon appeal; but I can find no authority given to the court by any provisions of the Code, nor can I find that the court ever, prior to the adoption of the Code, had claimed any power to restrain by injunction the execution of the warrant in such proceedings,

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except for fraud or want of jurisdiction. In fact, the section of the Revised Statutes above referred to prohibits such intervention upon the part of the court; and section 2265 is equally positive in its terms, except that it reserves the right to a stay in certain cases by subdivision 1, and to an injunction in certain other cases mentioned in subdivision 2, neither of which subdivisions authorizes this court to issue the injunction prayed for herein.

[¶] As to whether the judge who tried this proceeding has the power to stay the execution of the warrant, by order, upon the giving of an undertaking, or otherwise, by virtue of the provisions of subdivision 1 of section 2265, it is not necessary that I should express an opinion, as the decision of that question is not necessary to the disposition of this motion.

[¶] I am of the opinion, therefore, that this court has no power to issue the injunction prayed for, and that the temporary injunction should be dissolved, with costs.

**SHAW, LANDLORD AND APPELLANT, v. McCARTY,
TENANT AND RESPONDENT.**

N. Y. MARINE COURT, GENERAL TERM; DECEMBER, 1880.

§§ 2231, 2260-2262, 2265.

Summary proceedings.—In what case, pending appeal, execution of warrant may be stayed.—When warrant issued for illegal use cannot be stayed.—Stay in marine court.

The provisions of the Code of Civil Procedure in relation to staying the execution of a warrant in summary proceedings to recover the possession of real property, pending appeal from the final order under which such warrant was issued, apply only to a case where the tenant holds over after a default in the payment of rent.*

* See note, *ante*, p. 229.

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After the entry of a final order awarding delivery of possession to the petitioner on account of the use of the premises for an illegal business, the court has no authority to stay the execution of the warrant, pending appeal.

The relation of the provisions of subdivision 2 of section 2265 to the marine court, discussed.

(Decided December 16, 1880.)

Appeal by landlord from an order of a justice made at chambers, granting the tenant a stay of the warrant in summary proceedings to recover possession of real property on account of the use of the premises for an illegal business, pending appeal to the general term from the final order under which such warrant was issued.

The facts in this case are stated *ante*, pp. 49-56.

Edward P. Wilder, for appellant.

David Mitchell (*Joseph Ullman*, attorney), for respondent.

By the Court. — HAWES, J. — It is clear that the legislature intended to make these proceedings conform, in methods of practice, to the general rules which govern all special proceedings in courts of record; but the principles which govern them, and which are set forth in the Revised Statutes, must be deemed fundamental, and to a certain extent restrictive, in view of a correct interpretation of the new Code as relating to them. In case of non-payment of rent, the Revised Statutes provided a stay, if the rent and costs and charges of the proceedings were paid. In case of insolvency of tenant, the warrant was stayed, if costs were paid and security for rent given; and under an alleged sale by execution, it was stayed, if costs were payed, an affidavit of claim to property by virtue of a subsequently acquired title was filed, and a bond given to pay costs in any ejectment

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suit, as well as to pay for use and occupation and waste during occupancy. The proceeding being statutory, the special conditions under which the warrant is stayed must be held to exclude all others, upon well-settled principles of construction. A *certiorari* granted by the supreme court did not stay or suspend a warrant.

A careful consideration of the provisions of the new Code will, I think, fail to show any general power to stay the warrant, derived from analogous reasoning. Instead of *certiorari*, the tenant has the right of appeal by virtue of section 2260; but this of itself gives no stay of execution, for, although the appeal herein granted shall be of like effect as in case of an appeal taken from a judgment rendered in a court (embodied virtually in section 1351 of the Code), yet, in such a case, no stay follows, unless the statute is complied with in filing the prescribed bond, or the court specifically orders such stay. Section 2261, however, specifically limits and defines the power that might inferentially be deemed inherent in section 2260 granting the court power to grant such stay; for it declares that the issuing or execution of the warrant cannot be stayed by such appeal, or by the giving of an undertaking thereupon, except as prescribed in the next section. The power thus constructively granted to the court by virtue of section 2260 to stay, by order, is clearly abrogated, unless it can be found in section 2262, following. This section, however, merely makes provision for a stay in case of a tenant holding over after default in payment of rent. As the warrant in this case was granted on the ground of illegal use of premises, under subdivision 4 of section 2231, this provision of section 2262 can have no possible application, and there is, moreover, no pretense that he has ever filed the bond required by the section. Under this view, there is no occasion to discuss the somewhat remarkable exception set forth in this

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section of the Code. It will thus be seen that there is no power to stay proceedings by virtue of an appeal, or the incidental authority involved therein, except in the specific instance referred to. As if to remove any possible doubt upon this question, section 2265 contains a most sweeping provision, and declares, that no court or judge shall stay or suspend a warrant, except by an order made, or undertaking filed, in the case prescribed in this title, clearly referring to section 2262, *supra*. It certainly means this, if it means anything. I do not propose to attempt an explanation of the disjunctive "or" in this connection, which is a very remarkable use of the word. In the light of the express prohibitions and limitations imposed upon the court, both in the Revised Statutes and the new Code, restricting the power to stay, it cannot be seriously claimed that it was the intent of this provision to set them all aside and restore the power absolutely. Section 2262 requires both an order and an undertaking. The prepositional clause doubtless relates to both order and undertaking; and, in that light, it is susceptible of a possible explanation, although at the expense of doing serious violence to the English language, viewed in connection with a proper construction of section 2262. The second subdivision warrants a stay by virtue of an injunction order, granted in an action of ejectment against the petitioner. It also provides, that the injunction order shall not be granted after a final order, except in a case where it would be granted to stay the execution of the final judgment in such an action. It may well be asked if the term *injunction*, as here used, is not generic in its character, and in the marine court, where no power to grant an injunction exists, might not the term be deemed tantamount to a stay, and thus be construed as giving the court the power to stay with like effect as though it could issue an injunction. The difficulty, however, lies

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in the very plain and unequivocal character of the language. It is not only an injunction order, but an injunction order *granted in an action against the petitioner*. There is, therefore, no mistaking its force and effect. No such power resides in this court. I do not, therefore, see what power exists to stay the execution of the warrant.

From the papers presented, I deem the case one of great hardship, and I think, in justice and equity, that the stay granted by the judge below should be continued until the appeal could be heard; but I am unable to discover any authority in this court, or in any of its judges, after the entry of the final order dispossessing the tenant, to stay the execution of the warrant.

Order reversed, with costs and disbursements to appellant.

SHERIDAN, J., concurred.

VAN SCHAICK v. KOSTER AND ANO.

N. Y. MARINE COURT, CHAMBERS; NOVEMBER, 1882.

§§ 2233, 2261, 2262, 2265.

Forcible entry and detainer.—Proceedings for, conform to summary proceedings.—Execution of warrant in, cannot be stayed pending appeal.—

It seems, constructive force is sufficient to constitute.

By section 2233 of the Code, proceedings for forcible entry and detainer are made to conform to summary proceedings to recover possession of real property.*

Where the final order in proceedings to recover possession for forcible entry and detainer awards possession to the petitioner, the marine court has no authority to stay the execution of the warrant pending appeal.

Shaw v. McCarty (3 McC. Civ. Pro. R. 285), approved.

It seems, that constructive force is sufficient to constitute the act of forcible entry and detainer.

* See note, *ante*, page 229.

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Motion by defendants to stay the execution of a warrant in proceedings to recover possession of real property for forcible entry and detainer, pending appeal from the final order under which such warrant was issued.

The facts out of which this proceeding arose are stated in *Koster v. Van Schaick*, *ante*, p. 228. After the motion for the temporary injunction in that action had been denied, this application was made by an order to show cause with an *ad interim* stay of proceedings.

Chas. W. Brooke (*L. Ansbacher*, attorney), for defendants.

A. H. Stoiber (*Van Schaick, Gillender & Stoiber*, attorneys), for plaintiff.

HYATT, J.—This is an application to stay the execution of the warrant of possession issued in a proceeding for forcible entry and detainer, pending an appeal from the final order entered in said proceeding.

By section 2233, Code of Civil Procedure, proceedings in cases of forcible entry and detainer are made to conform to summary proceedings for the possession of real property.

After a careful examination of the minutes of trial of this case, I am of the opinion that forcible entry and detainer was established by the proof. If there can be any doubt as to the exercise of actual force, there still remains by admission constructive force, which is sufficient to constitute the act. This court, at general term, in the case of *Shaw v. McCarty* [2 *McC. Civ. Pro. R.* 235], has decided that it has no authority to stay the execution of the warrant after the entry of the final order of possession. In both cases the act complained of is an illegal act, and a violation of law; and the reasoning in the case of *Shaw v. McCarty* (*supra*) applies in all

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respects to the one at bar; it must be deemed to be the law in this court.

Motion denied, with costs, and the temporary stay vacated.

**CASSEL AND ANO., RESPONDENTS, v. FISK AND ANO.,
APPELLANTS.**

**SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
MARCH, 1882.**

§§ 604, 2265.

Injunctions in summary proceedings.—Should not be granted when complaint contains no prayer for, nor allegations appropriate to such relief; and when material allegations of affidavits on which granted are positively denied under oath.—Very clear case is required to justify the granting of.—

Policy of the law in regard to summary proceedings.

Where the plaintiffs, tenants of the defendants, brought an action to recover damages for a violation, by the defendants, of the contract under which the premises were demised, and the complaint contained no prayer for an injunction, nor any allegations appropriate to such a remedy, and the defendants, after the commencement of said action, instituted summary proceedings to recover possession of the demised premises for non-payment of rent, and the plaintiffs, relying upon section 604 of the Code, thereupon, on affidavits, obtained an injunction in their said action for damages, restraining the prosecution of such summary proceedings pending the determination of the action, and the defendants, on affidavits denying the material facts set forth in plaintiffs' affidavits, made a motion to vacate the injunction, which was denied,—*Held*, reversing the special term, that in consequence of the complaint not containing any prayer for an injunction, nor any allegations appropriate to that remedy, no foundation had been laid for such relief;[1] that the material allegations of the affidavits upon which the injunction had been granted being positively denied under oath; and, as a general rule, such denial defeating an injunction, and a very clear case being required to justify the

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restraining of summary proceedings for non-payment of rent, the injunction should be vacated. ["]

It is obviously the policy of the law to compel the surrender of demised premises upon failure to pay the rent reserved; and nothing short of an extreme case, clearly established, will justify an injunction to stay summary proceedings. ["]*

(Decided May 27, 1882.)

Appeal by defendants from an order of the special term denying a motion to vacate a temporary injunction.

The plaintiffs, copartners, in September, 1881, hired from the defendants, for a term of about eight months, certain premises situate in the city of New York, with the understanding, as alleged, that the defendants should furnish them with five-horse steam power. The defendants failing to supply any power, the plaintiffs provided an engine and boiler and furnished their own power; and brought this action against the defendants for damages for a breach of contract. The complaint contained no prayer for equitable relief, nor any allegations upon which to base such relief, and merely demanded a money judgment.

The plaintiffs paid the rent of the premises for the first month, but thereafter refused to pay the same, unless the defendants would make a deduction on account of their failure to supply steam power, or should furnish such power.

After the commencement of this action, the defendants began summary proceedings to recover possession of the premises, on the ground that the plaintiffs held over and continued in possession after a default in the payment of rent. The defendants, on affidavits showing the circumstances out of which this action arose, and setting forth that they were unable to procure any other suitable place for their business until May, 1882, that

* See Note on Injunctions in Summary Proceedings, 1 Civ. Pro. R. (1 McCarty) 425.

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the removal of the machinery used in their business would be attended with great cost, and that the defendants were non-residents and insolvent, that the plaintiffs were willing to pay a reduced rent for the premises, but that the defendants refused to make any reduction therein, and that if the plaintiffs were dispossessed or compelled to pay the full rent, they would be without any adequate remedy, obtained, in this their said action for damages, an injunction order restraining the defendants from prosecuting the summary proceedings pending the final determination of the action.

The plaintiffs, on affidavits setting forth that they had agreed to furnish only two and one-half horse power, and had, through the action of the authorities in pronouncing the boiler upon the premises unsafe, been unable to furnish any power, that they were residents and solvent, and were now, and had been at all times, willing to make a reasonable deduction in the rent, moved to vacate the injunction. The motion was denied and the defendants appealed to the general term.

S. B. Chittenden, Jr. (Fiero, Chittenden & Fiero, attorneys), for appellants:

The complaint does not set forth a cause of action calling for equitable relief, it is merely for damages for a breach of contract, and it does not pray for an injunction. An injunction should be granted only when it appears from the complaint that the plaintiff is entitled to such relief, *Fowler v. Burns*, 7 *Bosw.* 637; *Stull v. Westfall*, 25 *Hun*, 1; *Code of Civ. Pro.* § 628. The plaintiff cannot help out the cause of action relied upon in the complaint, by allegations in his affidavits, *Hentz v. Long Island R. R. Co.*, 13 *Barb.* 646. As to the distinctions between actions at law and in equity, see *Reubens v. Joel*, 13 *N. Y.* 488.

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The insolvency and all the equities set up by the plaintiffs are positively denied. When such is the case, and it is doubtful whether the plaintiffs will ultimately be entitled to the relief demanded, the injunction should be dissolved, Steinberg *v.* O'Conner, 42 *How.* 52; Finnegan *v.* Lee, 18 *Id.* 186; Durant *v.* Einstein, 35 *Id.* 223; Blatchford *v.* N. Y. and N. H. R. R. Co., 5 *Abb.* 276; Knox *v.* McDonald, 25 *Hun.* 268. When the plaintiff can be compensated by damages, such compensation is his best remedy, Murray *v.* Knapp, 42 *How.* 462; Van Vechten *v.* Howland, 12 *Abb.*, *N. S.*, 461; Sternberg *v.* O'Conner, *supra*. On the question of insolvency, see Ward, *v.* Kelsey, 14 *Abb.* 106.

In the absence of fraud, surprise, or the want of jurisdiction, an injunction should not be granted to stay summary proceedings, Ward *v.* Kelsey, 14 *Abb.* 106; Wordsworth *v.* Lyon, 5 *How.* 463; Armstrong *v.* Cummings, 20 *Hun.* 313; Sherman *v.* Wright, 49 *N. Y.* 227; Brown *v.* Metropolitan Gas Co., 38 *How.* 133; Knox *v.* McDonald, 25 *Hun.* 268; *Code of Civ. Pro.* § 2265.

The court will not interfere where the tenant has a legal defense, unless he has been prevented from making such defense by fraud or surprise, McIntyre *v.* Hernandez, 7 *Abb.*, *N. S.*, 214; Aaron *v.* Baum, 7 *Rob.* 340.

Section 47 of 2 *R. S.*, 516, was not repealed by Code of Procedure, Duigan *v.* Hogan, 1 *Bosw.* 645; Hyatt *v.* Burr, 8 *How.* 168; Bokee *v.* Hamersley, 16 *How.* 461; Sherman *v.* Wright, *supra*.

Franklin Bien, for respondents:

The plaintiffs would be unable to interpose the defense possessed by them in the summary proceedings instituted by the defendants, and therefore the injunction was properly granted, Valloton *v.* Seignett, 2 *Abb.* 121; McIntyre *v.* Hernandez, 7 *Abb.*, *N. S.*, 214; Forrester *v.* Wilson, 1 *Duer.* 624; Griffith *v.* Brown, 3 *Rob.* 627.

Cassel *v.* Fisk.

Under subdivision 1 of section 604 of the Code of Civil Procedure, the plaintiffs claim that an injunction can be granted, during the pendency of the action, to restrain acts done or threatened in violation of the plaintiffs' rights, and that the complaint need not be in equity, Sebring *v.* Lant, 9 *How.* 346, 347; Malcolm *v.* Miller, 6 *Id.* 456; Perkins *v.* Warren, 6 *Id.* 341; Merritt *v.* Thompson, 3 *E. D. Smith*, 284.

By the Court.—INGALLS, J.—A careful consideration of this case has induced the conclusion, that the injunction granted herein cannot be sustained. The action instituted by the plaintiffs is to recover damages for an alleged violation, by the defendants, of the contract by which the premises were demised to the plaintiffs.

[1] The complaint contains no prayer that an injunction issue, nor does it contain any allegations appropriate to such a remedy; and, consequently, no foundation is therein laid for such relief, Stull *v.* Westfall, 25 *Hun*, 1.

The plaintiffs rely upon section 604 of the Code of Civil Procedure to sustain the injunction, which section provides as follows: “Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of plaintiffs' rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.” The act of which the plaintiffs complain is the instituting, by the defendants, of summary proceedings to dispossess the plaintiffs from the occupancy of said premises for non-payment of rent. The material facts which are alleged in the affidavits relied upon by the plaintiffs, are positively denied under oath by the defendants, particularly the allegation in

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regard to their pecuniary inability to respond in damages to the plaintiffs for any breach of said agreement. As a general rule, such positive denial under oath defeats an injunction. The case should be very clear to justify the restraint, by injunction, of summary proceedings, instituted by the landlord to recover the possession of premises for non-payment of rent by the tenant, *Sherman v. Wright*, 40 N. Y. 228; *Knox v. McDonald*, 25 Hun, 268; *Armstrong v. Cummings*, 20 Hun, 313.

[³] It is obviously the policy of the law to compel the surrender to the landlord of demised premises, upon failure to pay the rent reserved. And nothing short of an extreme case, clearly established, will justify an injunction to stay such summary proceeding against the tenant. We have examined the cases cited in support of the injunction, and fail to discover in them authority, when applied to the facts of this case, which will justify the continuance of the injunction.

The order of the special term must be reversed, with costs, and the injunction vacated.

DAVIS, P. J., and BRADY, J., concurred.

JONES, LANDLORD, *v.* DEMADY, TENANT.

N. Y. MARINE COURT, CHAMBERS; NOVEMBER, 1882.

§ 2231.

Summary proceedings.—For use or occupation of premises as a bawdy-house.—Cannot be maintained, unless premises are so used at the time proceedings are commenced.

Summary proceedings to recover the possession of real property, on the allegation that the premises are used as a bawdy-house, cannot be maintained, unless it appear from the evidence that the premises were used in the manner complained of at the time when the proceedings were commenced.

Shaw v. McCarty (2 McC. Civ. Pro. R. 49), followed.

Jones v. Demady.

Summary proceedings by landlord to recover the possession of demised premises, on the allegation that the same were used and occupied as a bawdy-house.

The petition set forth that the premises were let as a dwelling-house, and alleged, on information and belief, that, subsequent to such letting, the tenant had used and occupied them as a bawdy-house, and still continued to use and occupy them for such illegal purpose.

The answer denied the use or occupation of the premises as a bawdy-house, and the evidence was to the effect that they had not been so used or occupied for some time prior to the commencement of the summary proceedings.

Aug. R. McMahon, for landlord.

E. E. Price, for tenant.

McADAM, J.—The evidence fails to show that the premises complained of were used as "bawdy-houses" at the time the proceedings were commenced. This proof is necessary under the ruling in *Shaw v. McCarty* [2 *McC. Civ. Pro. R.* 49]. The inference properly inferable from the evidence is, that the premises had not been so used or occupied for several weeks preceding the issuing of the precept. The evidence clearly points to this as a fact.

Judgment for tenant.

Pflugheber *v.* Leske.

PFLUGHEBER *v.* LESKE.

N. Y. COMMON PLEAS, SPECIAL TERM; AUGUST, 1882.

§ 549.

Orders of arrest.—In actions for personal injuries.—Practice of court of common pleas in granting.

In the court of common pleas for the city and county of New York, the practice is not to grant orders of arrest in actions for personal injuries, unless it is satisfactorily shown that there is danger that the defendant will depart from the State.*

An instance of a defendant being held to bail in a nominal sum, in an action for a breach of promise to marry and for seduction under such promise.

Motion by defendant to vacate an order of arrest.

The action was brought to recover the sum of \$5,000 damages for a breach of promise to marry and for seduction under such promise.

On an affidavit charging, upon information and belief, that the defendant, a foreigner, was about to depart from the State and go abroad, an order of arrest was granted in which the bail was fixed at the sum of \$500. On the hearing of the motion, the defendant admitted the act of copulation with the plaintiff, but denied the promise to marry, the seduction, and any design to depart from the State; and in support of the last mentioned denial showed that he had, previous to the bringing of the action, declared his intention of becoming a citizen, and had enlisted in the national guard.

Traitel, Platzek & Otterbourg, for motion.

Jno. A. Dinkel, opposed.

* For a fuller statement of the practice in the court of common pleas, see *Davis v. Scott*, 15 Abb. 127; and see, also, *Brophy v. Rodgers*, 7 N. Y. Leg. Obs. 152.

Pfugheber *v.* Leske.

VAN BRUNT, J.—In view of the gross abuses which have arisen resulting from the granting of orders of arrest in actions for personal injuries, this court has, following the rule adopted in the old supreme court, refused such orders, unless it was satisfactorily shown that there was danger that the defendant would leave the State.

In a great majority of cases, such orders are obtained merely for the purpose of oppression and vexation, and the bail required is many times larger than any possible recovery. I remember that in one term of this court some years ago ten cases of personal injury were tried, the causes of action being for assault and battery, and breach of promise of marriage, and seduction. The bail in these cases aggregated \$30,000, and the total amount of the recoveries was less than \$600. These facts seemed to illustrate in a remarkable manner the wisdom of the practice of this court.

In this case, it is true that the plaintiff swears that somebody told her that the defendant had threatened to leave the country; but the facts stated in the defendant's affidavit in support of his denial of any intention to leave the country, seem more than to negative the allegations of the plaintiff. The order, perhaps, should not be vacated, but the bail should be reduced to one dollar.

Orvis v. Lambeau.

ORVIS v. LAMBEAU AND ANO.*

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
OCTOBER, 1882.

§§ 439, 443, 526, 638, 1932.

Warrant of attachment.—When service of summons upon one of two defendants, jointly liable, will uphold.—Service of summons without the State.—

What defects, in notice to be subjoined to such summons, are not fatal or jurisdictional.—Verification of pleading.—When all allegations of complaint are on information and belief, verification on information and belief is proper.

Where a warrant of attachment is granted in an action against two defendants jointly liable, service of the summons upon one of such defendants, within thirty days after the granting of the warrant, is sufficient to uphold the attachment.^[1]

Where, in personal service to be made without the State, the notice required by section 443 of the Code to be subjoined to the summons was not subscribed by the plaintiff's attorney, and omitted the day of the month on which the order was granted, pursuant to which such service was made,—*Held*, that neither of these defects was fatal nor jurisdictional;^[2] and that a warrant of attachment granted in the action would not be vacated therefor. The warrant may accompany the issuing of the order for such service, and so precede the commission of these defects, and be valid until a failure to serve the summons within the proper time.^[3] †

There are two modes of making allegations recognized by the rules of pleading; one absolute, or unqualified, and the other, qualified, or upon information and belief. The verification of a pleading is only required to be appropriate and adapted to the mode of allegation contained in the pleading; and although the form contained in section 526 of the Code is adapted to a pleading containing both modes, if all the allegations be absolute, the verification should be absolute, and if all the allegations be qualified, the verification should be qualified; and it is not necessary to employ the twofold form of verification for a pleading

* An appeal by defendant Goldschmidt to the general term, is pending.

† See *Blossom v. Estes*, 84 N. Y. 614, affirming, 28 Hun, 472; *Mojarrieta v. Saenz*, 80 N. Y. 547; *Taylor v. Troncoso*, 76 N. Y. 599; *Bogart v. Swezy*, 26 Hun, 468.

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which contains but one mode of statement.[""] A pleading is verified when the deponent affirms the truth of its allegations to the degree stated in such pleading.[""] *

Accordingly, where all the allegations of a complaint were upon information and belief, and the form of verification was, "that the foregoing complaint is true as he [the affiant] is informed and believes," etc., — *Held*, that the complaint was well verified.[""]

Motion by defendant Goldschmidt to set aside the service of summons and complaint by publication, and to vacate a warrant of attachment.

The action was brought to recover a money judgment for goods sold and delivered to the defendants as copartners. All the allegations of the complaint were upon information and belief, and it was verified by the plaintiff's attorney. The verification set forth, "that the foregoing complaint is true, as he is informed and believes," and it then proceeded to state the source of the affiant's information and belief, and the reason why the complaint was not verified by the plaintiffs.

* Section 524 of the Code provides that, unless the allegations of a pleading are therein stated to be made upon information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. This section is new; and for the end sought to be attained by its enactment, see Mr. Throop's note to section 524 of his edition of the Code (1880), and see, also, *Neuberger v. Webb*, 24 *Hun*, 347; *Broughton v. Downey*, 21 *Id.* 436; *Bowghen v. Nolan*, 58 *How.* 485, S. C., 5 *W. Dig.* 100; *Ladue v. Andrews*, 54 *How.* 160, S. C., 5 *W. Dig.* 262; *Stent v. Continental Natl. Bank*, 5 *Abb.*, N. C., 88; *Mertraz v. Pearsall*, *Id.* 90.

Where the complaint contained two counts, and the answer consisted of two paragraphs, the first denying positively the allegations in the first count of the complaint, and the second paragraph setting forth that the defendant had no knowledge or information sufficient to form a belief as to the truth of the matters contained in the second count of the complaint, it was said of the second paragraph of the answer, that it was not an allegation upon information and belief, but a denial that the defendant had either knowledge or information upon which he was enabled to form a belief, and that both forms of denials were positive; and it was held upon this state of facts, that it was needless to insert in the verification of the answer the words, "except as to the matter's therein stated to be alleged

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The warrant of attachment against the joint property of the defendants was granted on February 7, 1882, and the order for service by publication, with the option of personal service without the State, was made on March 1, 1882. Personal service of the summons, with personal service notice, a copy of the complaint, and order for service by publication, was made upon the defendant Lambeau, without the State, on March 6, 1882, but service upon the defendant Goldschmidt was not made until March 14, 1882, and was then effected without the State.

The further facts are sufficiently stated in the opinion.

Herman Frank, for defendant Goldschmidt and motion.

Herbert E. Kinney, opposed :

Cited as to the sufficiency of service upon one of two joint debtors, *Code of Civ. Pro.* § 1932; Northern Bank

on information and belief," because none of the matters were so alleged. Section 526 does not prescribe any particular words in which the verification must be made, but merely provides that it must be *to the effect* stated in that section. *Bowghen v. Nolan*, 53 *How.* 485, S. C., 5 *W. Dig.* 100.

Where the complaint contained no allegations upon information and belief, and the verification was to the effect that it was true of the pleader's own knowledge, "except as to the matters therein stated on information and belief, and as to those matters he believes it to be true," it was held, that as under section 524 all the allegations of such a pleading must be regarded as having been made upon the knowledge of the party verifying, the verification was to the effect that the pleading was true to the knowledge of the deponent, and that the remaining words were surplusage, and did not impair the force of the verification. *Ladue v. Andrews*, 54 *How.* 160, S. C., 5 *W. Dig.* 262.

In *Stent v. Continental National Bank* (5 *Abb.*, N. C., 88), per DONOHUE, J., it was said: "Under the old Code, the mode of pleading allowed an answer positively denying, when, in fact, that denial was simply on information, and so the verification could show. I do not understand the Code, as it now stands, as allowing such a verification; and, therefore, the denial on information must be in the answer, and so stated."

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of Ky. v. Wright, 5 Rob. 604; Lahey v. Kingon, 13 Abb. 192, S. C., 22 How. 209; Yates v. Lyons, 61 Barb. 205; Stannard v. Mattice, 7 How. 4.

POTTER, J.—This is a motion to set aside the service of a summons and complaint by substitution, and a warrant of attachment. The motion is made on behalf of one of two joint defendants, upon technical grounds only, and he appears in the action, only for the purposes of the motion.

[1] The grounds of the motion are, that the summons was not served within thirty days after granting the warrant of attachment. I think the point is covered by service upon one of the defendants within that time, and that the proof of such service is sufficient.

[2] I think the notice subjoined to the summons is a sufficient compliance with the statute. The defects complained of are, that it was not subscribed by the attorney, and omits to state the day of the month on which the order for substituted service was made. I do not think either of these defects is fatal or jurisdictional.

[3] The warrant of attachment may accompany the issuing of the order, and so precede the commission of either of these irregularities in procuring an order for substituted service, and so be valid, until failure to serve the summons in time.

The further and, in my mind, the most serious objection is, that the order for substituted service was void, and hence there has not been, and could not be, any valid service of the summons under it. The contention is, that the complaint presented for procuring the order of publication was not verified, Sec. 439, *Code of*

[4] *Civ. Pro.* All the allegations of the complaint, in this case, are stated to be upon information and belief. The verification is that the foregoing complaint is true, as the affiant is informed and believes. Section

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526, Code of Civil Procedure, prescribes, that the verification of a pleading shall be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

[¶] There are two ways of making the allegations of pleadings recognized by the rules of pleading; one is absolute, or unqualified, and the other, qualifiedly, upon information and belief. In many, perhaps a majority of the cases, the pleader employs both methods in the same pleading. In other cases but one mode of statement is used. The formula for verification was intended to be short, and is adapted, as found in section

526, to a pleading containing both modes of statement. [¶] But the verification is only required to be adapted to, and be appropriate to, the mode of statement in the pleading. If the mode of statement in the pleading is absolute, then the verification shall be absolute; but if the mode of statement is qualified, then the verification should be qualified. To employ

the twofold method of verification of a pleading which contains but one mode of statement, is a waste of words, for they serve no purpose. A pleading is verified when the deponent affirms the truth of the allegations in the manner, and to the degree, stated in the pleading. This is verifying a pleading in effect according to the knowledge of the pleader.

[¶] My conclusion is that the pleading in this case was well verified.

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GATES, RESPONDENT, *v.* CANFIELD, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM; JUNE, 1882.

§§ 2951, 3235.

Costs on answer of bills in action for trespass quare clausum frigiti brought in justice's court.—Nonsuit is not the trial of an issue of fact, within § 3235.—When granted on defendant's motion, for failure of proof, defendant, and not plaintiff, is entitled to costs under § 3235.

Where, on the trial of an action for trespass *quare clausum frigiti*, originally brought in a justice's court, and on the defendant's answer of title renewed in the supreme court, the plaintiff gave some evidence, but none tending to prove the trespass, and then rested, the question of title to real property not having arisen, and he was thereupon, on motion of the defendant, nonsuited,—*Held*, that the trial was not of an issue of fact within the meaning of section 3235 of the Code.

The defendant's motion to dismiss the complaint for the want of evidence to sustain it, was analogous to a demurrer to evidence; and as his motion prevailed, the case was disposed of upon an issue of law without an issue of fact having been tried; [1] and, consequently, the case was not within the exception of section 3235, which entitles the plaintiff to costs although the final judgment is in favor of the defendant, upon the trial of an issue of fact: the defendant and not the plaintiff was entitled to costs. [1]

To hold, in such a case, that the plaintiff was entitled to costs would be contrary to the general policy of the statutes in relation to costs, and would enable plaintiffs, in like cases, by withholding their evidence upon the trial of the renewed action, to fraudulently secure a bill of costs against defendants. [1]

Section 3235 of the Code of Civil Procedure is a substitute for section 61 of the Code of Procedure,* and the change of language from the words

* For cases under section 61 of the Code of Procedure, see *Heath v. Barbour*, 35 *How.* 1, S. C. 58 *Barb.* 444; *Morss v. Jacobs*, 35 *How.* 90, affd. 48 *N. Y.* 336, *sub nom.* *Morse v. Salisbury*; *Hall v. Hodskins*, 30 *How.* 15; *Blake v. James*, 19 *How.* 321; *Niles v. Lindsley*, 8 *How.* 181, S. C. 1 *Duer*, 610; *Craven v. Price*, 58 *Barb.* 442, S. C. 37 *How.* 15.

The special term opinion in *Gates v. Canfield*, *ante*, p. 16, devotes some space to the definition of a final judgment, and to showing that a nonsuit is

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"upon a verdict," found in the latter section, to the words "upon the trial of an issue of fact," contained in section 8285 of the Code of Civil Procedure, was designed merely to include the case of a trial by the court or before a referee, as well as that of a trial by a jury.]

2 *McC. Civ. Pro. R.* 16, reversed.

(Decided, October 20, 1882.)

Appeal by defendant from an order of the Steuben county special term, denying a motion to have a taxation of costs, made in favor of the plaintiff, set aside, and that the costs be taxed in defendant's favor, and inserted in the judgment of nonsuit recovered by him against the plaintiff. (Reported below, 2 *McC. Civ. Pro. R.* 16).

The facts are sufficiently stated in the report *ante*, p. 160, and in the following opinion.

a final judgment within the meaning of section 8285. The general term, in here reversing that case, do not seem to regard the determination of this point as necessary to its conclusion; and the appeal is decided on the ground that a nonsuit is not the trial of an issue of fact within the meaning of section 8285.

Upon the general subject of what is a final judgment, and as showing what is not such a judgment within the meaning of the various acts of congress, authorizing appeals to the United States supreme court, and as deciding the important point that an appeal will not lie from the court of appeals to the United States supreme court, from a judgment which reverses a judgment sustaining a demurrer, and grants leave to answer, the recent case of *Bostwick v. Brinckerhoff* is reported below

U. S. Supreme Court; October Term, 1882.

BOSTWICK ET AL., PLAINTIFFS IN ERROR, v. BRINCKERHOFF, DEFENDANT IN ERROR.

What is a final judgment on which an appeal can be taken to the United States supreme court.—Must be one that terminates the litigation between the parties.—A judgment, which overrules a judgment sustaining demurrer, and grants leave to answer, is not.—Jurisdiction of State courts in actions against directors of national banks.

The rule is well settled that a judgment or decree to be *final*, within the meaning of that term as used in the acts of congress giving the supreme court jurisdiction on appeal and writs of error, must terminate the lit-

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Holliday & Bingham, for appellant:

The trial of an action brought to a close by the granting of a motion for nonsuit is not the trial of an issue of fact, within the meaning of section 3235 of the Code; that section contemplates a trial upon the merits.

No evidence having been given tending to establish the plaintiff's cause of action, the nonsuit was unavoidable, and the defendant could give no evidence. An order of nonsuit passes upon no question of fact, and is made expressly upon the ground that there exists no question of fact requiring to be passed upon. A nonsuit may be defined as a failure to follow up a cause, and is either voluntary or compulsory. A compulsory nonsuit is one ordered by the court, and it may be for the insufficiency of the evidence to support the cause of

gation between the parties on the merits of the case; so that should there be an affirmance by the supreme court, the court below would have nothing to do but to execute the judgment or decree it had already rendered.^[1]

Where, on appeal from a judgment of the general term sustaining a demurrer in an action for negligence against the receiver and directors of an insolvent national bank, the court of appeals reversed such judgment, and rendered judgment for plaintiff on the demurrer, with leave to the defendants to withdraw the demurrer and answer, and remitted the proceedings to the court below, and the defendant thereupon appealed to the supreme court,—*Held*, that to the extent of deciding that the action might be maintained in the state courts, the judgment of the court of appeals terminated the litigation between the parties, so far as the State courts were concerned; but the question whether there had been negligence, and, if so, the amount of damages, still remaining to be decided, the judgment sought to be reviewed did not terminate the litigation in the action, and was not a final judgment, and an appeal therefrom would not lie.

In error to the court of appeals of the State of New York.

Motion by defendant in error to dismiss the appeal, on the ground that it was not an appeal from a final judgment.

This action was brought in the supreme court of the State by one Brinckerhoff, a stockholder of the insolvent Fishkill National Bank, on behalf of himself and other stockholders, against the receiver and directors.

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action, 2 *Burrill's L. Dic.* 242. Nonsuit is no bar to a subsequent action for the same cause, *Audubon v. Excelsior Ins. Co.*, 27 *N. Y.* 216. A dismissal of the complaint is equivalent to a nonsuit, *Holmes v. Slocum*, 6 *How.* 217, 218; *Robbins v. Wells*, 26 *Id.* 15; *Coit v. Beard*, 33 *Barb.* 357.

Section 3235 of the Code of Civil Procedure is a substitute for section 61 of the old Code, and the change of words, from "upon a verdict," found in the old Code, to "upon the trial of an issue of fact," contained in the new, was evidently intended to include a case where the trial was before the court or a referee.

If this construction were not the true one, the trial of the renewed action could be made a mere trap to secure a bill of costs against the defendant. The plaintiff could commence his action upon such allegations as would

of said bank, charging misconduct and negligence on the part of such directors in the management of the affairs of the bank, whereby overdrafts were permitted, and money loaned without adequate security, etc., and alleging a refusal by the receiver, after request, to bring a similar action against the directors.

The defendants demurred to the complaint on the ground that the court had no jurisdiction of the subject of the action, and that the complaint did not state facts sufficient to constitute a cause of action. At special term the demurrer was sustained, and the plaintiff, thereupon, appealed to the general term, which, while holding that the State courts had jurisdiction, sustained the demurrer on the ground that the complaint did not contain a sufficient averment of the refusal of the receiver to sue. (See *Brinckerhoff v. Bostwick*, 28 *Hun*, 237). The plaintiff then appealed to the court of appeals, where, on February 7, 1882, it was ordered, "Judgment reversed, and judgment rendered for plaintiff on demurrer, with costs, with leave to the defendant to withdraw the demurrer, within thirty days, on payment of costs in this court and in the supreme court, and to answer the complaint. (See prefatory notice of the disposition of supreme court cases on appeal, 26 *Hun*, v. The case in the court of appeals has not as yet, December, 1882, been reported *). From this judgment, the defendants appealed to the supreme court of the United States.

E. A. Brewster, for defendant in error.

E. L. Funcher, for plaintiffs in error.

* The case is now reported, 88 *N. Y.* 52.

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require the defendant to plead title, and when the action was brought to trial, by simply submitting to a nonsuit, he would impose costs upon the defendant.

J. H. & C. W. Stevens, for respondent.

By the Court.—SMITH, P. J.—The plaintiff commenced an action against the defendant in a justice's court for trespass on lands, and the same having been discontinued by a plea of title, the plaintiff brought the present action in this court for the same cause, and the like defense was interposed here. The plea of title was accompanied in each court by a general denial. At the trial, at the circuit, the plaintiff gave no evidence tending to prove the trespass alleged in the complaint, and thereupon, the court, on motion of the defendant,

WAITE, Ch. J.—This was a suit begun in the supreme court of the State of New York, by a stockholder in a national bank against the directors, to recover damages for their negligence in the performance of their official duties. A demurrer was filed to the complaint, which raised, among others, the question whether such an action could be brought in a State court. The supreme court at special term sustained the demurrer, and dismissed the complaint. This judgment was affirmed at general term. An appeal was then taken to the court of appeals, where it was ordered and adjudged, "that the judgment of the general term * * * be * * * reversed, and judgment rendered for plaintiff on demurrer, with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs, * * * and to answer the complaint." It was also further ordered, that the record and the proceedings in the court of appeals be remitted to the supreme court, "there to be proceeded upon according to law." From this judgment of the court of appeals a writ of error was taken to this court, which the defendant in error now moves to dismiss, because the judgment to be reviewed is not a final judgment.

[¶] The rule is well settled and of long standing, that a judgment or decree to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered, *Whiting v. Bank of U. S.*, 18 Pet. 6, 15; *Forgay v. Conrad*, 6 Iowa. 201, 204; *Craighead v. Wilson*, 18 Id. 201; *Bebee v. Russell*, 19 Id. 285; *Bronson v.*

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dismissed the complaint; no evidence whatever having been offered by the defendant. Upon these facts, the plaintiff claims that he is entitled to costs, and that the defendant is not, and the special term has so held. The only question is, whether that position is correct.

The question depends upon the construction to be given to certain words contained in section 3235 of the Code of Civil Procedure. So much of that section as is material to the question is as follows: "Section 3235. Where an action, brought before a justice of the peace, * * * has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question; and a new action, for the same cause, has been commenced in the proper court; the party, in whose favor final judgment is rendered in

Railroad, 2 *Bl.* 524, 531; Thompson *v.* Dean, 7 *Wall.* 845; St. Clair Co. *v.* Lovington, 18 *Id.* 628; Parcels *v.* Johnson, 20 *Id.* 654; Railroad *v.* Swasey, 23 *Id.* 405, 409; Crosby *v.* Buchanan, *Id.* 420, 453; Commissioners *v.* Lucas, 93 U.S. 113. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts, the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error, Brown *v.* Union Bank, 4 *How.* 466; Pepper *v.* Dunlap, 5 *Id.* 51; Tracy *v.* Holcombe, 24 *Id.* 428; Moore *v.* Robbins, 18 *Wall.* 588; M'Comb *v.* Commissioners Knox Co., 91 U.S. 1; Baker *v.* White, 92 *Id.* 179; Davis *v.* Crouch, 94 *Id.* 514. This clearly is a judgment of that kind.

[¹] The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent the litigation between the parties has been terminated, so far as the State courts are concerned, but it still remains to decide whether the directors have, in fact, been guilty of the negligence complained of; and, if so, what damages the stockholders have sustained in consequence of their neglect. The court of appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can, in no sense, be said that the judgment we are now called on to review, terminates the litigation in the suit.

The motion to dismiss is granted.

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the new action, is entitled to costs; except that, where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified, that the title to real property came in question on the trial." Of course, in this case, there was no such certificate. The question comes down to this, was the trial at the circuit, the trial of an issue of fact, within the meaning of the section above transcribed? True, issues of fact had been joined by the pleadings, and such issues had been noticed and placed upon the calendar, and moved for trial, so that, probably, the party recovering costs of the action would be entitled to the fee given for the trial of an issue of fact, by section 3251 of the Code. But those considerations do not determine the present question. For when the plaintiff's evidence was out, it was apparent that there was no issue of fact to be tried, and the presiding judge thereupon withheld the case from the jury, [1] and disposed of it upon a question of law. The defendant's motion to dismiss the complaint for the want of evidence to support it, was analogous to a demurrer to the evidence, and as the motion prevailed, the case was disposed of upon an issue of law, without any issue of fact being tried.

[2] Section 3235 of the present Code is a substitute for section 61 of the Code of Procedure. That section provided as follows: "If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that *upon a verdict* he shall pay costs to the plaintiff, unless the judge certify," etc. We do not think the change of verbiage from the words "upon a verdict," to the words "upon the trial of an issue of fact," was intended to work the consequence contended for by the plaintiff, but it was designed merely to include the case of a trial by the court or a referee, as well as that of

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[³] a trial by a jury. The construction contended for by the respondent is contrary to the general policy of the statute as to costs; and, if adopted, would enable the plaintiff in every like case to work a fraud on the defendant, by withholding his evidence at the trial of a new action.

[⁴] If we are right in these views, there has been no trial of an issue of fact, within the meaning of the statute under consideration, and, consequently, the case is not within the exception made by the section; and the defendant, and not the plaintiff, is entitled to costs.

The order of the special term should be reversed, with \$10 costs and disbursements; and the defendant's motion granted, with \$10 dollars costs.

HARDIN and HAIGHT, JJ., concurred.

ADRIANCE, AS GRANTOR OF WILLIS, v. SANDERS.

N. Y. SUPERIOR COURT, SPECIAL TERM; OCTOBER, 1882.

§§ 803, 1501, 3338.

Discovery of books, etc.—Only party to action can be compelled to make.—In action of ejectment brought by grantee in name of grantor, grantee is the real plaintiff.—Grantor is not party to action, and cannot be compelled to make discovery.

Although the court has power to direct a party to the action to make discovery of books, etc., it has no power, under section 803 of the Code, to compel a person not a party to the action to make such discovery.* In an action of ejectment prosecuted by a grantee in the name of his grantor, as provided by section 1501 of the Code, the grantee and not the grantor is the real plaintiff; and the grantor cannot be compelled to make discovery of books, etc., as he is not a party to the action.

* See note on Discovery of Books, etc., 1 Civ. Pro. R. (1 McCarty), 176-193.

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Petition by defendant for discovery, inspection and copy of documents.

This was an action of ejectment brought by Charles W. Willis in the name of Margaret E. Adriance, his grantor.

After issue joined, the defendant moved that said Adriance be compelled to produce certain deeds, and to submit them to the inspection of the defendant, and that defendant be allowed to make copies thereof.

The application was opposed on the ground that, in such an action, the real plaintiff was the grantee, and that the grantor not being a party to the action, could not be compelled to make discovery.

Henry P. Townsend, for petition.

Wm. Settle, opposed.

TRUAX, J.—The party prosecuting a civil action is styled the plaintiff (§ 3338, *Code of Civil Procedure*). This action is maintained (or prosecuted) by the grantee in the name of the grantor, as provided in section 1501 of the Code of Civil Procedure. Therefore, the grantee, and not the grantor, is the real plaintiff.

The court may compel a party to the action to produce any books, etc., in his possession, but has no power to compel a person not a party to produce such books, etc., under section 803 of the Code of Civil Procedure. (See, also, *Hale v. Rogers*, 22 *Hun*, 19; *Elmore v. Hyde*, 2 *Abb. N. C.* 129, 133; *Strong v. Strong*, 3 *Robt.* 675.)

The motion is denied, with \$10 costs.

United States v. Rose.

UNITED STATES v. ROSE.

U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, EQUITY TERM; JANUARY, 1883.

§§ 1897, 1962, 1964.

Actions by the United States to recover penalties.—Such actions correspond with those brought by the people of the State.—When complaint is not served with the summons, summons must be endorsed as required by § 1897 of Code of Civil Procedure.—Summons not so endorsed is defective, and cannot be amended.

Actions brought by "The United States" entirely correspond with those brought by the State in the name of "The People," etc.; and Congress having adopted the "forms and modes of proceeding" of the several States, an action for a penalty brought by the "United States" in a federal court in the State of New York must be in the form and mode prescribed by the State for a similar action brought by "The People," etc.

Accordingly, where, in an action brought by the United States to recover a penalty for a violation of a provision of the *U. S. R. S.*, the complaint was not delivered to the defendant at the time when service of the summons was made,—*Held*, that the summons should have been endorsed with a reference to the statute and the penalty, as required by section 1897 of the Code of Civil Procedure.

In such an action, a summons, so served, which has not this endorsement, is defective in a material part, and is not amendable. The matter required to be endorsed is a substantial and material part of the writ because designed to give the defendant immediate notice of the nature of the action.

Motion by defendant to set aside service of the summons.

This action was brought by the United States, under § 4504, *U. S. R. S.*, to recover from the defendant a penalty of \$500, for having performed the duties pertaining to the office of a shipping-commissioner when he was not such a commissioner. The *præcipe* merely directed the issuing of a summons under § 4504 of the

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U. S. R. S., and the summons had no endorsement in reference to the statute under which the action was brought, nor to the section giving the penalty, as described in § 1897 of the Code of Civil Procedure. A copy of the complaint was not delivered to the defendant at the time when service of the summons was made.

Goodrich, Deady & Platt, for motion.

W. C. Wallace, Asst. U. S. District-Attorney, opposed.

BROWN, J.—Actions for penalties brought in the name of "The United States" correspond entirely with those brought by the State in the name of "The People," etc. Each represents the sovereignty which is plaintiff. Hence, when Congress adopts (§ 914 *U. S. R. S.*) the "forms and modes of proceeding" of the several States, an action by "The United States," brought in the State of New York, must be in the form and mode prescribed in this State for similar actions by "The People," etc.; and, therefore, the reference to the statute and penalty was required to be endorsed on the summons in this action, as prescribed by sections 1897, 1964 and 1962 of the New York Code of Civil Procedure.

The matter required to be endorsed is a substantial and material part of the writ, because designed to give immediate notice to the defendant of the nature of the action. The *præcipe* does not supply this notice, and was not a compliance with the statute. The summons having no endorsement was defective in a material part; and, hence, it is not amendable, and the service of the summons must be set aside (*Brown v. Pond*, 5 *Fed. Rep.* 31; *Peaslee v. Haberstro*, 15 *Blatchf.* 472; *Dwight v. Merritt*, 18 *Id.* 305).

Motion granted.

Beer v. Benner.

BEER, APPELLANT, *v.* BENNER, RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM; OCTOBER, 1882.

§§ 3, 4, 3214. § 48, Chap. 344, Laws of 1857.

Practice in district courts in the city of New York. — How far unaffected by Code of Civil Procedure. — § 48, Chap. 344, Laws of 1857. — District courts have power to grant interpleader.

Section 48 of Chap. 344 of the Laws of 1857, making §§ 55-64, both inclusive, and 68 of the Code of Procedure applicable to district courts in the city of New York, being unrepealed, the practice under said § 48, is, by reason of the provisions of §§ 3, 4, 3214 of the Code of Civil Procedure, still in force, so far as it has not been superseded by the Code of Civil Procedure.

Subd. 15 of § 64 of the Code of Procedure having made the provisions of that Code respecting parties to actions applicable to district courts, and § 122 thereof containing provisions for interpleader and being included in the title regulating the parties to actions, and the Code of Civil Procedure containing no provisions for interpleader in such courts, the former practice, in this particular, has not been superseded; and such courts have the power to grant an order of interpleader.

(Decided November 17, 1882.)

Appeal by plaintiff from an order of interpleader made by a justice of a district court in the city of New York.

This action was originally brought against one Diehl to recover the sum of \$250, alleged to be due the plaintiff, as a commission for having effected the sale of certain real property. One Benner claimed that such commission was payable to him, on the ground that, in the first instance, he had been employed by said Diehl to effect the sale, and that the plaintiff had no independent contract with Diehl, and had merely been his, Benner's, agent.

On application of Diehl, an order of interpleader was made, allowing the amount to be paid into court, and substituting Benner as the defendant in the action.

Judgment in the action was in favor of the defendant.

Beer *v.* Benner.

S. M. Roeder, for appellant.

Lorenz Zeller, for respondent.

By the Court.—J. F. DALY, J.—This was a proper case for interpleading. Benner claimed the money for which the suit was brought, because he alleged himself to be the actual contractor with Diehl, and claimed that the plaintiff was his agent and not an independent contractor. Diehl, therefore, stood as a mere stakeholder of a fund which belonged to one of two claimants, and was properly relieved of the suit on paying the money into court and substituting Benner as defendant. The question is, whether the district courts had power, at the date of the order of interpleader in the action (April 3, 1882), to make such an order. Prior to the Code of Civil Procedure, the district courts had that power (*Dreyer v. Rauch*, 10 Abb., N. S., 343). It was so held for the reason that section 48 of the district court act (Laws of 1857, chap. 344) made the provisions of sections 55 to 64, both inclusive, of the Code of Procedure applicable to the district courts. Section 64 of the Code of Procedure, subdivision 15, declared, that the provisions of that act (the Code), respecting parties to actions, should apply to the district courts. The provision for interpleader (sec. 122) was embraced in title 3, regulating parties to civil actions.

The Code of Procedure has been repealed, but section 48 of the act of 1857 has not been repealed. It reads as follows: “Section 48. The provisions of sections fifty-five to sixty-four, both inclusive, and of section sixty-eight of the Code of Procedure, shall apply to these courts, except that the transcript of judgment specified in the latter section, shall be furnished by the clerk of the court in which the judgment was rendered, and also except that the execution may issue as well out of the

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district court in which the judgment was rendered, as out of the common pleas."

There are provisions in the new Code relating to transcripts of, and executions upon, judgments of these courts, which supersede so much of section 48, above quoted, as regulates those matters (sec. 3220).

And there are other provisions of the new Code which partially supersede the regulations found in sections 55 to 64 and section 68 of the Code of Procedure. But there is no provision in the new Code as to interpleader in these courts, and so much, therefore, of the former practice is not superseded by any provision in the new practice.

We must assume, that the legislature in not repealing section 48 (although it included a direct reference to certain provisions of the old Code, and made the practice thereunder the practice of the district courts), had a purpose in view; and this purpose undoubtedly was to preserve to suitors and litigants in the district courts all the benefits which section 48 was originally intended to confer. Among these, none is so important and beneficial as the provision giving to defendant, in certain cases, the right to interplead the real contestant.

We shall, I think, be giving the natural and ordinary effect to the legislative intention, as expressed in its acts, and its omission to act, if we hold: —

1. That by section 48 of the district court act, so much of the practice of the Code of Procedure as may be embraced within sections 55 to 64 inclusive, and section 68, was made the practice of the district courts, as fully and as completely as if those provisions were incorporated in full in the act in question (chap. 344, Laws of 1857).

2. That the omission to repeal section 48, when other portions of the act were expressly repealed (see repealing act, chap. 245, Laws of 1880), is an expression of

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legislative will, that such portion of the practice under that section as was not superseded by the new Code, should be retained.

3. That this intention is confirmed by section 4 of the new Code, which, after an enumeration of all the courts in section 3, declares that: "Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act," and by section 3214 of the new Code, which provides that: "Except as otherwise specially prescribed in this title, this act does not affect any statutory provision remaining unrepealed after this chapter takes effect, relating to the jurisdiction and powers of either of those courts." * * * Section 48 of the act of 1877 is an unrepealed statutory provision relating to the powers of those courts.

There are no exceptions of importance in the case.

The attempt to contradict defendant (pages 24 and 25 of return), by introducing his letter-heading, was a contradiction upon a matter drawn out in cross-examination, and not involved in the issue; viz., as to whether he represented himself to be a member of a law firm.

The motion to strike out an answer as irresponsible (page 34 of return), was properly denied, because part of the answer was responsive.

The exception to the refusal to charge that the burden of proof lay on the defendant, was properly denied, because the plaintiff alleged in his complaint employment by Diehl, and the finding of a purchaser, which was denied by Benner's answer, and he was bound to prove it.

The request to charge should have been limited to what was strictly affirmative in Benner's defense.

Judgment should be affirmed.

VAN BRUNT, J., concurred.

Searing v. Goodstein.

SEARING, APPELLANT, *v.* GOODSTEIN, RESPONDENT.

N. Y. COMMON PLEAS, GENERAL TERM; OCTOBER, 1882.

§§ 2895, 3018, 3209.

How actions are now commenced in district courts.—Execution against the person in.—Depends upon nature of the action.—Plaintiff has the right to have defendant's liability to such an execution inserted in judgment for wrongful conversion of personal property.

Section 8209 of the Code limits the manner in which an action can be commenced in a district court of the city of New York to the voluntary appearance and joinder of issue by the parties, or by service of a summons. Section 10 of Chap. 344 of the Laws of 1857, permitting an action in such courts to be instituted by warrant or attachment, was repealed by Chap. 243 of the Laws of 1880.

Under the Code of Civil Procedure, the manner of commencing an action in such a court does not determine whether the plaintiff is entitled to a judgment making the defendant liable to an execution against his person. The right to such an execution now depends upon the nature of the action, and not upon the process by which the action was begun.

Where the plaintiff recovers judgment in a district court, in an action for wrongful conversion of personal property, he has the right to have inserted, by the justice, in the judgment, a statement of the liability of the defendant to an execution against his person, although no order of arrest was granted in the action.

Glacius v. Molditz (61 *How. 62*), distinguished as having been decided under the district court act.

(Decided November 17, 1882.)

Appeal by plaintiff from a judgment of a district court in the city of New York.

This action was brought to recover damages for a wrongful conversion of personal property, and was regularly begun by the service of a summons. No order of arrest was granted in the action. The defendant's answer was a general denial; and the trial resulted in the justice finding for the plaintiff, in damages and

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costs. Thereupon the plaintiff's counsel requested the justice to insert in the judgment the words, "defendant subject to arrest and imprisonment upon execution." This the justice refused to do, on the ground that in order to have a judgment allowing an execution against the person, it was necessary that an action of this description should have been commenced by warrant as the original process. The plaintiff excepted and brought this appeal.

Edward W. Searing, for appellant:

Urged that it was the intent of the Code, as shown by Mr. Throop's note to § 2876 and the preliminary note to article 3, title 2 of chap. 19 of his edition of the Code, to harmonize, so far as practicable, the proceedings in justices' courts with those of courts of record; that by force of sections 3209, 3210, 3018 and 2895, subds. 1 and 2, the right to an execution against the person of the defendant depended upon the nature of the action, and not upon the manner in which it was begun, or upon the granting and execution of an order of arrest; and that an action in such a court must now be commenced by a voluntary appearance or by the service of a summons.

Section 50 of chap. 344 of the Laws of 1857, which has not been repealed, provides: "Where judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, *it must be so stated in the judgment and entered on the docket.*'

Wm. Rothschild, for respondent:

Cited and relied upon *Glacius v. Moldtz*, 61 *How.* 62.

By the Court.—**VAN BRUNT, J.**—The question involved in this appeal is, as to the right of the plaintiff herein to have inserted in the judgment the words above men-

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tioned, no warrant or order of arrest having been issued in the action.

In the case of *Glacius v. Moldtz* [61 *How.* 62], it was expressly decided by the general term of this court that, under the district court act, such words should not be inserted in the judgment, unless the action had been commenced by warrant; that as a defendant could only be arrested in an action commenced by a warrant, and as the action was commenced by a summons, no execution against the person could issue.

The repealing act, chapter 245 of the Laws of 1880, among other things, has repealed section 10 of chapter 344 of the Laws of 1857, which provides that actions in district courts shall be commenced by summons, warrant, or attachment, or by voluntary appearance in person, and pleading without summons, warrant or attachment; and the Code of Civil Procedure, section 3209, has provided that actions in district courts must be commenced by voluntary appearance and a joinder of issue by the parties, or by the service of summons, thus limiting the manner in which actions may be commenced. Section 3220 provides, that sections 3017 to 3022 of this act, both inclusive, apply to a judgment rendered in a district court in the city of New York. Section 3018 provides if the action, in which the judgment is rendered, is one of the actions specified in subdivision first or second of section 2895 of this act, or if an order of arrest has been granted, and has been executed, in a case specified in subdivision third of that section, the justice must insert in each transcript given by him, as prescribed in the last section, the words, "defendant liable to execution against his person."

Subdivisions 1 and 2 of section 2895 of this act refer to actions to recover a fine or penalty, to recover damages for a personal injury, of which a justice of the peace has jurisdiction, an injury to property, including

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the willful taking, detention, or conversion of personal property, etc. It therefore follows, from these provisions of the Code, that the manner of commencing an action does not determine the question as to whether the plaintiff is entitled to have the clause in question inserted in the judgment, but that such right depends upon the nature of the action—a different rule from that prevailing under the district court act.

The cause of action in this case being for the wrongful conversion of personal property, is one of the actions specified in subdivision 2 of section 2895; and, consequently, the justice was bound to insert in the judgment the liability of the defendant to arrest upon execution.

The judgment must therefore be reversed, with costs.

J. F. DALY, J., concurred.

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ESTATE OF ADOLPH BROWN, DECEASED.

ESTATE OF ELIZABETH BAUER, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK; JANUARY, 1883.

§§ 2514, 2739, 2743.

Power of surrogate to determine claims against estate of decedent.—Has no power to determine validity of "debt, claim, or distributive share" when disputed by executor or administrator.—Validity of, must be determined in a court of competent jurisdiction.—What is comprehended in the terms "debt, claim or distributive share" as used in § 2743.—Surrogate has no power, on final accounting, to determine validity of a release or assignment made by a legatee or next of kin.—When accounting may proceed notwithstanding disputed claims.—§ 2739 does not include claims by a legatee or next of kin.

By limiting the authority of the surrogate, under section 2743 of the Code, to the determination of all questions concerning "debts, claims, or distributive shares," when the validity thereof "is not disputed, or has been established," it was intended that, whenever an executor or administrator should dispute the validity of a debt, claim, or distributive share, the jurisdiction of the surrogate to adjudicate upon the same should be forthwith suspended, until such debt, claim or right shall have been established by some competent tribunal other than the surrogate's court.^[*]

The terms "debt, claim, or distributive share," as used in section 2743, are designed to comprehend every species of demand which can be preferred against the estate of a decedent, by a creditor, legatee, next of kin, husband, or wife of the decedent, or by the assignee of any such person.^[**]

A dispute concerning the validity of any such debt, claim, or distributive share, when payment thereof is sought to be obtained at a final accounting, is a dispute involving the existence of the right to such debt, claim, or distributive share, at the time of the accounting.^[***] Accordingly, whenever a legatee or next of kin claims upon a final account-

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ing a share in the decedent's estate, and the accounting party disputes such claim and interposes against it a release or assignment, which the claimant asserts is invalid and ineffectual by reason of fraud, a contingency thereby arises, which requires the surrogate, in obedience to the intent of section 2748, to hold in abeyance his decree for distribution so far, at least, as concerns the interest in the estate to which such release or assignment relates, until the rights of the parties can be determined in another forum.^[19] Whether or not the mere accounting should be postponed until an adjudication has been had upon the matters as to which the surrogate has no jurisdiction, depends upon the circumstances of each case.^[1, 2, 21] But when the accounting is allowed to proceed, a person who claims a share or interest in the estate should be permitted to take part therein, notwithstanding the fact that he is alleged to have released or assigned such share or interest; provided he interposes allegations of fact disputing the validity of such release or assignment, and but for the existence of such release or assignment, he would be entitled to such share or interest.^[22]

Section 2739 provides, that a contest between the accounting party and any other party in interest may be determined by the surrogate, where the contest relates to a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, or where it relates to property of the estate to which the accounting party lays claim. But the provisions of this section are manifestly too narrow to include the case of a legatee or next of kin whose claim is disputed by the executor or administrator on the ground that the claimant has released or assigned his interest in the estate, and the claimant contends that such release or assignment was procured by fraud.^[23]

Significance of the word "debts," as defined in section 2514, stated.^[17]

Authority of the surrogate to determine disputed claims, under the provisions of the *R. S.* [1⁸], stated.

Cases in relation to the power of the surrogate to inquire into the validity of releases, examined and discussed.^[4, 11, 24]

Cases in relation to the power of the surrogate to inquire into the validity of assignment, examined and discussed.^[12, 14, 25]

Petition by executors of the estate of Adolph Brown, deceased, for a judicial settlement of their account; and petition by the administratrix of the estate of Elizabeth Bauer, deceased, for a judicial settlement of her account, and for the distribution of the estate.

Both proceedings were considered together; and the facts are sufficiently stated in the opinion.

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Sigismund Kaufmann, for petitioner in the estate of Brown.

Coleridge A. Hart, opposed.

Randolph Guggenheim, for petitioner in the estate of Bauer.

Henry Metzinger, opposed.

ROLLINS, Surrogate.—The above entitled cases have been coupled, and will be considered together, though they neither concern the same parties nor relate to the same estate.

Indeed, the two proceedings somewhat differ from each other in respect to the nature of the issue submitted for the determination of the court. Each involves, however, an important question as to the jurisdiction of the surrogate, and as to the construction of a provision of the Code from which that jurisdiction, if it exists at all, is solely derivable.

Brief statements of the facts of these cases will disclose the nature of the controversies.

Case No. 1.—Brown's executors filed their accounts in October, 1880, and commenced proceedings before my predecessor for their judicial settlement.

Two daughters of the testator, who were legatees under his will, interposed objections. This the executor insisted they had no right to do, because of the execution of certain releases whereby their respective interests in the estate are claimed to have been absolutely extinguished.

The legatees denied the validity of these releases on the ground of alleged fraud in their procurement, and the surrogate (after overruling the objection that he had no jurisdiction to inquire into and determine the matter), decided, upon the facts as then presented, that the

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releases should be upheld, and that their effect was to deprive the objectors of any right to contest the accuracy of the accounts filed by the executor.

The objectors subsequently applied to the present surrogate for a reargument, and such reargument was permitted for reasons stated in an opinion on file.

The inquiry is now presented anew—whether these contestants can avail themselves of their objections; and, so far at least as relates to one of them, whether the surrogate should inquire into and determine the validity of the release with which she is confronted.

Case No. 2.—Catharine Kostner has filed her account as administratrix of the estate of Elizabeth Bauer. John Bauer, the husband of decedent, whose right to be a party to this proceeding is attacked for reasons which are foreign to the present inquiry, and which will be elsewhere considered, has heretofore assigned to the administratrix whatever interest he may have had in his wife's estate. He claims, however, that this assignment was procured by fraud; that the circumstances under which it was executed should be investigated by the surrogate, and that, as a result of such investigation, it would be pronounced invalid.

The administratrix insists that the issue thus presented is not triable in this court; that the contestant's objections should be ignored, and that the estate would be distributed as if they had never been interposed.

Two questions are thus presented for my determination:—

1st. Has the surrogate jurisdiction to inquire into, and pass upon, the validity of the release and of the assignment in the above entitled proceedings?

2d. If he is without jurisdiction, should the objections on file be entertained, or should they be disregarded?

[¹] Prior to the adoption of the present Code of Procedure, the surrogate derived from section 71, title 3,

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chapter 6, part 2 of the Revised Statutes (3 R. S. [Bank's 6th ed.], 104), whatever authority he possessed in reference to the determination of,—

(a) The validity and effect of releases and assignments by persons interested in the estates ; and,

(b) The validity of disputed claims of creditors.

The provisions of section 71 were as follows :

" Whenever an account shall be rendered, and finally settled, * * * if it shall appear to the surrogate that any part of the estate remains to be paid or distributed, he shall make a decree for the payment and distribution of what shall so remain, to and among the creditors, legatees, widow and next of kin to the deceased, *according to their respective rights*; and in such decree *shall settle and determine all questions* concerning any debt, claim, legacy, bequest or distributive share ; to whom the same shall be payable ; and the sum to be paid to each person."

This language was very comprehensive, and was, doubtless, supposed to be plain and unequivocal when it was adopted into the statutes.

Its meaning, however, at once became the subject of spirited contention in the various courts of this State, and forms the topic of a multitude of reported decisions (see Martine's Estate, 11 Abb., N. C., 50).

The court of appeals finally determined in the case of Tucker v. Tucker (4 Keyes, 136), that, so far at least as concerned the matter of disputed claims of creditors, the surrogate's court had no jurisdiction to adjudicate upon them.

This doctrine has since been frequently re-asserted, and is maintained in the very recent case of Glacius v. Fogel (88 N. Y. 434).

It is a doctrine, which, as I have elsewhere stated, seems to me to demand such an interpretation of section 71 as is fairly summed up in these two propositions :

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[¶] 1st. The delegation to surrogates of authority to decree, upon the final accounting of an executor or administrator, a distribution to claimants *according to their respective rights*, gave power to ascertain and determine the nature and extent of those rights, *only in cases where they were conceded to exist*; and,

2d. The imposition upon the surrogate of the duty "to settle and determine *all questions* concerning any debt, claim, legacy, bequest or distributive share," empowered him to settle and determine such questions, and such only, as were not a matter of dispute between the parties, or, in simpler phrase, *such questions as there was no question about*, Martine's Estate, *supra*.

Nearly all the decisions which I have condensed into the two propositions just stated, relate to matters involving the demands of persons claiming to be creditors of a decedent's estate, but not conceded to be such by the executor or administrator.

[¶] Though not authoritative upon the precise questions here at issue, I am, nevertheless, at loss how to put any interpretation upon section 71, which would at once consist with those decisions and sustain the right of this court to exercise such authority as is invoked in the present proceedings; and I should probably hold, without further inquiry, that I had no jurisdiction to pass upon the release and assignment which are respectively interposed in the cases at bar, but for certain recent decisions to which I feel bound to refer.

[¶] In Strong *v.* Strong (3 Redf. 477, 480), it was decided that, prior to the adoption of the Code, the surrogate's court possessed the power to inquire into the validity of releases.

But the argument by which that conclusion is supported is substantially the same as that which was persistently, but vainly, urged in Tucker *v.* Tucker, *supra*,

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and in a score of supreme court decisions relating to disputed claims.

It has been urged, that the intimation of the court of appeals in *Harris v. Ely* (25 N. Y., 138, 142), should be regarded as authoritative in this matter. The question there at issue was whether an executor was properly required to account at the instance of a legatee. This legatee, the widow of decedent, had twelve years previously given the executor a receipt in full of all demands *up to that date*, and had also executed a deed conveying to him, as trustee for herself, all her personal estate.

The court held, that the receipt was no bar to the accounting, as it did not profess to be an admission that the executor had fully administered the estate, and that the deed, which was in the nature of an antenuptial settlement, was not intended in any respect to discharge the executor, and did not in fact discharge him from the liability of filing an account.

In pronouncing the opinion of the court, Judge DENIO cited the case of *Kenny v. Jackson* (1 *Hagg. Eccl.*, 105), wherein it was held that, though a residuary legatee had executed a release, whose validity was disputed and could not be determined in the prerogative court, the executor should, nevertheless, at his instance, be required to account. Judge DENIO made a passing comment to the effect, that the jurisdiction of our surrogates' courts so exceeded that of the English ecclesiastical tribunals, as to permit an adjudication upon the validity of releases interposed in bar of an accounting.

So far as I have discovered, from the time when the decision in *Harris v. Ely* was rendered (1862), it was never, for the succeeding sixteen years, referred to in any cases included in the reports of this State.

[¶] In 1878 the court of appeals passed upon the appeal of *Bevan v. Cooper* (72 N. Y. 317).

At the trial below, the then surrogate of this county

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had adjudicated upon the question whether, under a will, certain legacies were or were not a charge upon a testator's real estate. In this, the court of appeals held that he had exceeded his authority. In discussing the general subject of the nature and extent of the surrogate's jurisdiction, the court said :

"There is an intimation in *Harris v. Ely* (25 N. Y. 138, 142), that a surrogate, on an accounting, may try the validity of a release, but the remark was *obiter*." So far as this allusion has any significance it must be deemed, when read in the light of its context, as a disapproval of the *dictum* in *Harris v. Ely*. But it will be observed that the more recent intimation is itself *obiter*, and should not, therefore, be regarded as a final determination of the question.

[¶] By its decision in *People ex rel. Wright v. Coffin* (7 Hun, 608), the supreme court, general term of the second department, seems to maintain the right of a surrogate, before the repeal of section 71 of the Revised Statutes, *supra*, to execute such authority as is here invoked by the contestants. An offshoot of the same litigation is the case of *Wright v. Fleming* (12 Hun, 469), wherein it is claimed, that the general term of the supreme court in the first department took the same view of the surrogate's jurisdiction. It does not seem to me, however, that the question here under consideration was intended to be passed upon in that case. From the recital of facts which accompanies the opinion of the presiding justice, his statement that under the circumstances there disclosed "the surrogate committed a palpable error by his decision to *disregard* the releases," which were the subject of that contention, by no means involves the notion that it was within the scope of the surrogate's authority to receive and weigh the evidence for and against those releases, and then to decide upon their validity.

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The allegations of the complaint were opposed only by a demurrer; and, for aught that appeared by the pleadings, the defendants had executed releases against which there was no opposing evidence, but which, nevertheless, the surrogate utterly disregarded.

[⁷] To say that this disposition of the matter was error, was to say something which is not decisive of the present contention. Nor, on the other hand, does the language of the court of appeals, in its review of this decision, seem to me to mean what is claimed by the opposing counsel. (See *Wright v. Fleming*, 76 N.Y. 517.)

It seems that after the surrogate had announced his purpose of "disregarding" the releases (though without an adjudication that they were invalid), he directed a distribution of the estate as if they had never existed. Thereupon the accounting administrator commenced an action in the supreme court, whereby he sought to enjoin the entry of any decree which should require him to pay to the parties who had given the releases, large sums of money to which, but for such releases, they would admittedly have been entitled from the funds of the estate. The defendants in that action demurred. At special term, the demurrer was overruled, and judgment was rendered for the plaintiff.

The general term reversed this judgment on the merits; holding that an appeal was the proper remedy for the error into which, in its judgment, the surrogate had fallen, and that the circumstances did not call for the intervention of a court of equity.

The court of appeals, in a *per curiam* opinion, sustained the judgment of the general term, but intimated that the injunction ought to have been granted if the complaint had not been deficient in some of its allegations.

[⁸] The court said: "The facts alleged to sustain

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the prayer of the complaint for an injunction are not sufficient. It alleges the giving of releases and assignments, and that the surrogate disregarded them when presented to him in the proceedings in his court. It is not alleged that he had, or had not, the power to consider and pass upon them. * * * It is plain, however, that there can be no final and complete settlement of the plaintiff's accounts, * * * until it is determined by an authentic adjudication whether the releases and assignments are valid, and what is the force and effect of them. It is therefore well that, if the plaintiff is so advised, he should amend his complaint, and make averments which will tender an issue upon the validity of the releases, and the effect of them, to relieve him from liability to the makers of them, and to vest in him their interest in the estate of his intestate, so that there may be such an adjudication. * * * The proceedings before the surrogate should not go forward so far, as that the releases if upheld, will be of no avail to him. * * * The accounting may be had, so far forth, as that the balances for or against him may be ascertained, and all things be in readiness for the entry of a final decree.

Hence he ought to have an injunction, upon his complaint, if he shall amend it as above indicated, restraining the proceedings in the surrogate's court beyond the point mentioned above."

This is the full opinion of the court of appeals so far as relates to the subject of the present inquiry. It seems to me, that there is room for great divergence of opinion as to the application of this decision to the facts of such a case as the present. It is certainly not squarely determined that, under the Revised Statutes, the surrogate's court *had* jurisdiction or *had not* jurisdiction to inquire into the force and effect of releases whose validity had been assailed by the parties executing them.

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[⁹] It was urged by the appellants in that action, that the remedy by injunction should be accorded because of the alleged misconduct and irregularity of the trial court in "disregarding" the releases there in question, after having admitted them in evidence.

A simple question of law, they said, would have been raised if the surrogate had refused, for lack of jurisdiction, to permit the introduction of those instruments; and, on the other hand, if, after they had been admitted, evidence had been offered tending in anywise to impair their validity and effect, a question of fact would have arisen. In either contingency, as they argued, error could have been effectually corrected by resort to the ordinary remedy of appeal. But they claimed that:—

1st. The "disregard" of an instrument which had been admitted in evidence, whose validity, force and effect had not been attacked by evidence in opposition, and which purported to be a "full, absolute and final release" of the defendant's claims; and,

2d. The avowal of a purpose on the part of the defendants to enter a decree in harmony with this "disregarding," were circumstances which afforded sufficient grounds for the interference of a court of equity.

How far the court of appeals acted upon this view is not apparent from the language of its decision.

[¹⁰] It is fairly open to dispute, whether its determination that the plaintiff would be entitled to an injunction upon making the suggested amendments in his complaint, was based upon the theory that the surrogate had absolutely no jurisdiction in the premises, or merely upon the theory that his decision was erroneous, and that any decree by which it should be made effective would inflict upon the plaintiff an injury against which he should be permitted to interpose the shield of an injunction.

So, too, when the court says that the proceedings

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before the surrogate ought to stop short of the entry of a final decree, it is by no means clear whether these remarks were intended to be limited to a class of cases wherein, as in the one then under review, the surrogate had indicated his purpose of ignoring the effect of releases without adjudging them to be invalid, or whether, on the other hand, that language was designed to have a wider reach, and to declare that, until a controversy over the validity and effect of a release should be determined by another tribunal, the surrogate ought, under no circumstances, to enter a decree of distribution as to any portion of the estate to which such release appertained.

This case is certainly not decisive of the present contention, and if the Code of Civil Procedure had made no substantial change in the statutes, I should feel bound to adhere, until otherwise advised by an appellate tribunal, to the position which seems to have the sanction of the supreme court in the second department, and which, in this very proceeding (*Estate of Adolph Brown*), was maintained by my predecessor.

[¹¹] This I should do with the greater confidence in view of the recent decision of the court of appeals in *Riggs v. Cragg* (*Daily Register*, October 21, 1882), a decision which certainly gives a more liberal interpretation to section 71 than it has hitherto received, and settles in the affirmative the much mooted question whether, upon a final accounting to which all persons interested were made parties, the surrogate had power, under that section, to construe a will.

[¹²] Before examining the meaning of the Code provisions which have supplanted that section, it is proper to consider briefly the question, what authority is conferred upon the surrogate to pass upon the validity of assignments made by persons interested in an estate? In *Bonfanti v. Deguerre* (3 *Bradf.* 429), the

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plaintiff, legatee, sought to procure from the defendant, executor, an accounting. The executor set up in answer that the plaintiff had executed to one W. assignments of his entire interest in the decedent's estate. The applicant alleged in opposition, that the assignment was procured by misrepresentations, for which the executor was himself responsible. Surrogate BRADFORD refused to inquire into the validity of the assignment, but as the only reason which he gave for his action was his lack of jurisdiction, because of the fact that the assignee was not a party to the proceedings, the case is of little utility.

[¹³] *Hitchcock v. Marshall* (2 Redf. 174) is, however, directly in point. Surrogate COFFIN there held that, even where no question arose as to the validity of an assignment executed by a person entitled to a distributive share, he did not feel authorized, under the law as it stood prior to the enactment of the Code, to recognize such an assignment, and to direct distribution accordingly. This view he re-asserted in *Haskin v. Teller*, 3 Redf. 316, 321, and in *Strong v. Strong*, 3 Redf. 477, 481, and in *Leviness v. Cassebeer*, 3 Redf. 491.

[¹⁴] I am informed that, in New York county, it has been for years the practice of this court to recognize and give effect to assignments when they have not been attacked, but that whenever their validity has been the subject of controversy, the court has refused to exercise any jurisdiction concerning them.

We are now brought to the consideration of the question to what extent, if at all, the authority of the surrogate has been affected by the substitution of the existing law in place of the repealed provisions of the Revised Statutes.

It has been necessary to examine those repealed provisions and the decisions to which they have given rise, because the section of the Code, which will presently be

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quoted, and which is now the sole source of the surrogate's authority in these matters, was designed to bring the very letter of the new law into exact conformity with the interpretation which the courts had put upon the language of the old, and thus to prevent in the future all doubts and disputation as to its meaning. Such is declared by Mr. Commissioner Throop (see note to section 2743 of his edition to the Code) to have been the aim of the commissioners in changing the phraseology of the statute. The new provision is as follows:

"Where an account is judicially settled, * * * and any part of the estate remains, and is ready to be distributed to the creditors, legatees, next of kin, husband, or wife of the decedent, or their assigns, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. * * * Where the validity of a debt, claim, or distributive share, is not disputed, or has been established, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same" * * * (§ 2743, Code).

I do not share the confidence of the commissioners that these provisions have been so skillfully worded as to leave no room for future contention. But my own interpretation of them, and of their application to the cases now before the court, is as follows: —

[¹⁵] First. By this limited grant of authority to determine all questions concerning "debts, claims, or distributive shares," when their validity "*is not disputed, or has been established,*" it is intended that, whenever the executor or administrator *shall dispute* the validity of a debt, claim, or right to a distributive share, the jurisdiction of the surrogate to adjudicate upon it is straightway suspended until such debt, claim, or right shall have been established by the judgment of

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some competent tribunal, and of some tribunal, of course, other than the surrogate's court itself.

[¹⁶] Secondly. The terms "debt, claim or distributive share," as used in section 2743, are designed to comprehend every species of claim or demand against a decedent's estate, which may be, or can be, preferred by any individual belonging to any of the classes of persons previously enumerated in that section, *i. e.*, by any creditor, or legatee, or next of kin, or husband, or wife of decedent, or by the assignees of any one of [¹⁷] such persons. Indeed, the word "debt," of itself, must be deemed to have a significance almost as broad as this, if we are to heed its definition in section 2514. "The word 'debts,'" says that section, "includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action." * * *

[¹⁸] Thirdly. That a dispute about the *validity* of any such debt, claim, or distributive share, whose payment is sought to be obtained or secured at a final accounting, is a dispute about whether the right to such debt, claim or distributive share, at the time, exists.

[¹⁹] Fourthly. That accordingly, whenever one, as next of kin, or legatee, claims upon a final accounting a share in the decedent's estate, and the accounting party disputes his claim, and interposes against it a release or an assignment, which is assailed by its maker as invalid and ineffectual by reason of fraud, a contingency has arisen which requires the surrogate, in obedience to section 2743, to hold in abeyance his decree of distribution, so far, at least, as concerns that interest in the estate to which such assignment or release relates, until the rights of the parties can be determined in another forum.

[²⁰] If the provisions of the Revised Statutes were still in force, it might be claimed with some show

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of reason, that the surrogate's right to determine a controversy between an accounting executor or administrator and a person claiming as legatee or next of kin, touching the validity and effect of a release or assignment *to the accounting party himself*, might be defended as within the spirit, if not the letter, of recent decisions of the court of appeals. See, for example, the cases of *Kyle v. Kyle*, 67 N. Y. 400, 408; *Shakespeare v. Markham*, 72 N. Y. 400; *Boughton v. Flint*, 74 N. Y. 476, which lend some support to the notion that whatever claims of interest in an estate its executor or administrator sets up may be passed upon by the surrogate.

[²¹] But section 2739 of the Code seems to have established certain restrictions in this regard, which are too plain to be overlooked. It provides, that a contest between the accounting party and any other party in interest may be determined by the surrogate, when it relates to a debt alleged to be due by such accounting party to the decedent, or by the decedent to the accounting party, or when it relates to property of the estate to which the latter lays claim. The provision is manifestly too narrow to include such cases as the present.

Having no power to pass upon the validity of either the release in the Brown estate or of the assignment in the estate of Bauer, what disposal ought I to make of the objections which have in each case been interposed? It is insisted by the accounting parties, that the claims of the objectors to appear as such should be denied, and that the proceedings should be conducted to a final decree as if their objections had not been filed.

But would not such a course imply an assumption that the instruments whose validity is attacked are in fact valid? In other words, would it not, practically, involve just such a determination of their validity as the court has no right to make?

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It seems to me that one or the other of two courses should be taken for protecting the rights of all [2ⁿ] parties in such controversies as these. Either the inquiry into the correctness of the accounts should be postponed until an adjudication is had in the matters as to which the court lacks jurisdiction, or if the inquiry is suffered to proceed, every person who claims a share or an interest in the estate should be allowed to take part therein, despite the fact that he is alleged to have assigned or released such share or interest, provided that he interposes allegations of fact disputing the validity of such assignment or release, and that but for such assignment or release he would be entitled to such interest or share, Thomson *v.* Thomson, 1 *Bradf.* 24; Burwell *v.* Shaw, 2 *Bradf.* 322; Dickson's Estate, 11 *Philadelphia*, 86; Wistar's Estate, 12 *Philadelphia*, 48; Kenny *v.* Jackson, 1 *Hagg, Eccl.* 105; Martine's Estate, 11 *Abb., N. C.*, 50; Giles' Estate, 11 *Abb., N. C.*, 57; Buchan *v.* Rintoul, 70 *N. Y.* 1. [2^s] Which of these two courses should be pursued in any given case must depend upon a variety of circumstances that need not be here considered or enumerated.

In both of the present proceedings, I have decided to permit the contests to go on at once. Orders may, therefore, be presented for submission to a reference of the accounts and of the objections thereto.

Estate of Batchelor.

ESTATE OF WILLIAM A. BATCHELOR, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK; JANUARY,
1883.

§§ 2697-2699, 2643, 2644.

When letters of administration with will annexed cannot be granted.—When such ancillary letters cannot be.—Where persons having prior right to such letters of administration have not renounced, what petition must pray for.—Who must be cited.—How such proceeding is properly instituted.—Petition must pray for petitioner's own appointment.

Where, on the petition of decedent's executrix, who claimed to be, as such, a creditor of decedent's estate, it appeared that the will of the decedent had been admitted to probate in another state, and that letters testamentary had been issued thereon to the wife of the decedent, and that an exemplified copy of the will had been filed in the office of the surrogate of the county of New York, in which county, it was alleged, there were unadministered assets of the estate; that the said wife of decedent had been cited to appear and qualify, but failing so to do, an order had been entered declaring her to have renounced; that thereafter, on petition, citations were issued to the next of kin and heirs at law to show cause why letters of administration with the will annexed should not be granted, and that only one of the persons so cited had appeared, and the proceedings had been discontinued by a withdrawal of such petition, and the present petition prayed for the issuing of only one citation, and that to the person who had appeared as aforesaid, requiring him to show cause why letters of administration with the will annexed should not be issued to the public administrator of the county of New York.—*Held*, that under the facts of this application, the surrogate was not warranted in granting either ancillary letters of administration with the will annexed, or original letters of administration with the will annexed; [']

That ancillary letters could not be granted, because the application was not brought within §§ 2697-2699 of the Code, which provide to whom such letters may be granted, and prescribe the steps necessary to be taken in order to procure the same; and that no title to such letters had been shown either by the petitioner or by the public administrator, in whose behalf the petitioner moved; [']

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That if it be assumed in such a case that original letters of administration with the will annexed might lawfully be granted on proper application, the papers in this proceeding would not justify such grant, for the petition prayed that a citation be issued to only one of the next of kin or heirs at law to show cause why letters should not be granted to the public administrator, and the citation was accordingly issued; whereas section 2644 of the Code provides that, unless every person having a prior right to such letters has renounced, the petition must pray that all persons having a prior right, and who have not renounced, be cited to show cause why administration should not be granted to the petitioner. ["]

To properly initiate such proceedings, the petitioner should have asked for her own appointment, and have cited the public administrator and all persons entitled to priority in the grant of letters, to show cause. ["]

Motion by respondent to dismiss a petition.

The facts are sufficiently stated in the opinion.

Bagley & Thain, for respondent and motion.

Marshall & Benson, for petitioner and opposed.

ROLLINS, Surrogate.—In February last, Mary A. Batchelor, executrix of one Charles Batchelor, deceased, and claiming to be, as such, a creditor of decedent's estate, presented to the surrogate a petition alleging that the will of decedent had been admitted to probate in the State of Maryland, and that an exemplified copy thereof had been filed in this court. The petition also averred, that testamentary letters had been issued in Maryland to decedent's widow, Lucretia A. Batchelor; that there were unadministered assets of the estate in the county of New York; that decedent had left him surviving several next of kin and heirs at law, whose names were set forth; that Lucretia A. Batchelor had been cited to appear and qualify as executrix or show cause why she should not be deemed to have renounced; that she had failed to appear, and that thereupon an order had been entered declaring her to have renounced. The petition

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then prayed for a citation to the said next of kin and heirs at law, to appear and show cause why *letters of administration with the will annexed*, in decedent's estate, should not be issued to the public administrator of this county. A citation was thereupon issued, which, in an important particular, failed to conform to the prayer of the petition, for it cited the parties to show cause why letters of administration with the will annexed *should not be granted to the petitioner herself*.

This citation was returned in April. It is claimed that the service upon some of the parties was worthless, but it is unnecessary to pass upon that contention, for reasons which will presently appear.

The petitioner seems to have thought fit to abandon this proceeding, and in June, 1882, she asked and obtained leave to withdraw the petition above referred to, and to file another in its stead. This new petition contained allegations similar to the other, and added that the various persons originally named as the next of kin and heirs at law had, with the single exception of William A. Batchelor, failed to appear on the return day of the citation. It prayed for a citation to William A. Batchelor (but to no other persons whomsoever) to appear and show cause why letters of administration with the will annexed should not be granted to the public administrator. A citation was issued in strict conformity with the second petition, and seems to have been duly served.

- [¹] Upon the proceedings above recited, I am not warranted in granting either original or ancillary letters of administration with the will annexed.
- [²] 1. Not ancillary letters. The Code prescribes, by sections 2697, 2698, 2699, to whom such letters shall issue, and what steps shall be taken to procure their issuance. Those steps have not been taken in the present case, and neither the petitioner nor the public

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administrator, in whose behalf she applies, shows any title to letters ancillary.

[³] 2. If it be assumed that, in such a case as the present, a grant of original letters might lawfully be made upon a proper application, it is plain that they cannot be issued upon the papers now before me.

Sections 2643 and 2644 of the Code establish the procedure by which the authority of the court, in this regard, must be set in motion. The former section [⁴] prescribes the order of priority of right to the letters. The latter provides that an application for their issuance must be made by petition, unless every person having a prior right has renounced, and that such petition must pray that all persons *having* a prior right, and who have *not* renounced, be cited to show cause *why administration should not be granted to the petitioner.*

In the present case the applicant asks that a citation issue to the respondent, William A. Batchelor, to show cause why letters should not be granted *to the public administrator*, and the citation corresponds with the petition.

[⁵] The applicant, if she desired to initiate these proceedings, should have asked for her own appointment, and have cited the public administrator and such other party or parties as were entitled in priority to letters of administration with the will annexed.

Petition dismissed.

MCCARTY'S CIVIL PROCEDURE REPORTS. 295

People *ex rel.* Gould *v.* Mutual Union Telegraph Company.

THE PEOPLE EX REL. GOULD AND ANO. *v.* THE
MUTUAL UNION TELEGRAPH COMPANY.

N. Y. SUPERIOR COURT, SPECIAL TERM; DECEMBER,
1882.

§§ 1798, 1799, 1986.

Compensation of attorney-general.—That provision of § 1986 entitling him to, from relator, is unconstitutional.—Standing of, in respect to power he can confer on counsel.—He cannot delegate his position as attorney.—

Ex parte application by, for leave to bring action against corporation.—When defendant may move to vacate order so granted.—Application of attorney-general for such leave must be on written petition.—Signing of petition is not a ministerial act, and cannot be delegated nor subsequently ratified.—Petition must be signed and verified by attorney-general.—Practice on moving for leave to sue.

That provision of section 1986 of the Code, which entitles the attorney-general to compensation for his services in an action brought on the relation of a person in interest, to be paid by the relator, is unconstitutional, being in conflict with article 5, section 1 of the Constitution, which absolutely prohibits the attorney-general, among other officers, from receiving to his use any fees, perquisites of office, or other compensation in addition to his salary. [4]

Although the attorney-general has authority to employ counsel,* he stands, in respect to the power which he can confer on his counsel, upon the

* The court of appeals, In the Matter of the Attorney-General *v.* Continental Life Ins. Co. (88 N. Y. 571), discuss, although they do not determine, the right of the attorney-general to appoint special counsel to act, generally, in his place. It would seem from the tenor of the opinion, that the attorney-general has no such authority, except in cases where it is conferred by statute. But in the Matter of the Attorney-General *v.* The North American Life Ins. Co. (Court of Appeals; decided Jan. 16, 1883; not as yet, Feb. 10, 1883, reported), it is said: "Both parties refer to our recent decision in Attorney-General *v.* Continental Life Ins. Co. 88 N. Y., 571. What was there decided harmonizes entirely with our present conclusions. We denied the right of the State, through an allowance to its chief law officer, or to special counsel by him employed, to

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same spotting as any other attorney; and he cannot delegate to counsel his position as attorney, and so deprive himself or his successor of the right to control the proceedings in the action. [44]

The attorney-general may, under §§ 1798, 1799, make an *ex parte* application for leave to bring an action against a corporation; but it is within the power of the court to direct that notice of the application be given to the proposed defendant [1]. Where the application has been granted *ex parte*, the defendant may, after the commencement of the action, inquire into the regularity of the leave; and the proper mode of presenting objections to the order, and of directing attention to whatever might, in the first instance, have induced the court to refrain from granting the same, is to move, before the court, to set aside the order. [1, 2, 3, 10]

Application by the attorney-general for leave to begin an action must be made on written petition, and whatever papers are referred to in the petition become the basis thereof, and should be filed therewith. [1]

Where the defendant, a corporation, moved to set aside an order giving the attorney-general leave to bring the action, and it appeared that the petition upon which the order had been granted was not signed by the attorney-general himself, although purporting to have been so signed, and that the petition had been verified by private counsel.—*Held*, granting the defendant's motion, that the act of signing such a petition was not a ministerial act, and could not be delegated; that the court had a right to know by the signature of the attorney-general himself that he was the petitioner, and to hold him personally responsible for the act, and that no subsequent ratification could give validity to the signing; that even if the petition itself might be ratified, the verification could not be, as a petition cannot be sworn to by proxy, and no subsequent verification could ratify the prior act; and that the irregularities of the petition were fundamental. [1, 2, 14]

The practice on moving for leave to bring an action stated. [1]

share in the assets of a dissolved company. We could discover no ground or principle, no substantial equity, upon which such an allowance could be defended. What was further said as to the power of the attorney-general to employ special counsel, related to a retainer very broad and comprehensive. We intimated in that case, on a review of the statutes, that neither the attorney-general nor the governor, except in the cases pointed out by the statute, was authorized to employ counsel to appear for the people, so as to make their compensation a charge against the treasury; but we did not determine that the attorney-general could not depute special counsel to appear in his behalf, they making no claim against the State for compensation; nor that their right to so appear was open to question more freely than if they claimed to represent a private individual." See People *v.* Metropolitan Telegraph, etc., Co., *post*, p. 304.

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Motion to vacate and set aside an order granting the attorney-general leave to bring an action against the defendant.

The action was brought by the people on the relation of private persons, to procure a judgment vacating the charter or annulling the existence of the defendant, for an alleged violation of law and usurpation of franchise.

The order allowing the attorney-general to bring the action was granted upon the *ex parte* application of private counsel representing the attorney-general; and the petition upon which the order was based referred to various papers and exhibits in the case, and was verified by private counsel, who set forth in the verification thereof, that he was authorized by the attorney-general to sign the petition in the name of the attorney-general, and to verify the same, and that he made the verification for the reason that the attorney-general was not in the city and county of New York. The papers and exhibits referred to in the petition were not filed.

The defendant moved to vacate the order, on the grounds that it had not been granted upon the application of a person having authority to bind the people, and that all the papers used and read upon the application, and on which the order was granted, had not been filed in the office of the clerk.

The further facts are sufficiently stated in the opinion.

Robert Sewell, F. N. Bangs, Ashbel Green (Alexander & Green, attorneys), for defendant and motion.

Leslie W. Russell, Attorney-general, Edward C. James, J. T. Davies (Davies, Work, McNamee & Hilton, attorneys), for plaintiff and opposed.

ARNOUX, J. — The questions involved in this motion are not only important and novel, but they have been

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discussed with unusual ability by the several counsel who have been heard in the course of the argument.

First. The most important, in its relation to the office of the attorney-general, is that of his right to accept private retainers under the provisions of section 1986 of the Code of Civil Procedure.

It is gratifying to observe that, as public attention has been called to this argument, this section has been universally condemned. A Turkish kadi dispenses justice to the highest bidder. This is worse, for it allows bidding only on one side. If an attorney-general should refrain from bringing an action because he accepted moneys from the proposed defendant, it would be a clear case of bribery; but here he can accept moneys from the relator and thus be influenced by pecuniary considerations in his official action. This, in the forum of ethics, would be wholly indefensible. It must be equally [¹] reprobated in a court of justice. More than this, it is contrary to the Constitution, which provides as follows:

"The secretary of state, comptroller, treasurer and attorney-general shall be chosen at a general election, and shall hold their offices for two years. Each of the officers in this article named, * * * shall, at stated times during his continuance in office, receive for his services, a compensation, which shall not be increased or diminished during the term for which he shall have been elected; *nor shall he receive, to his use, any fees or perquisites of office, or other compensation.*" (Const., art. 5, § 1.)

[²] The restriction respecting increasing or diminishing *during the term of office* is limited to the salary; the prohibition against fees, perquisites or other compensation is absolute. The power to receive compensation from a relator is attached to the attorney-general

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officially, and the compensation thus becomes a perquisite of his office.

It is clear that this provision of the Code is unconstitutional.

Second. The next question is the right of the attorney-general to employ counsel. At common law, an attorney has the right to employ counsel, although he cannot bind the principal without his assent to the compensation to be paid. The distinction between employment and compensation of attorneys in cases of trust is well defined. An executor may retain an attorney, but he cannot bind the estate to any compensation he may choose to make. District-attorneys often have the assistance of counsel in criminal prosecutions, for whose services the State pays nothing whatever. But the attorney could not delegate to such counsel his position as attorney without his client's concurrence, and this is recognized by the rules of this court requiring the consent of the party to an order of substitution.* The attorney-general stands as any other attorney. He may employ counsel, and the statutes giving him such authority are simply a recognition of his common law powers. He cannot do more in this regard than any other attorney, and this I understand to be the effect of the decision in *The Matter of the Attorney-General v. The North America Life Insurance Company* (88 N. Y., 571). That a different practice has arisen in the office of the attorney-general may be inferred from the following language of that distinguished officer in a public letter which this contention has called forth :

"I took the precaution of having an agreement made in writing, allowing myself, as attorney-general, if I deemed it necessary to step in for that purpose, to control the proceedings in the case, in order that the public

* Rule 19 of the New York Superior Court Rules.

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interest might not be jeopardized by any private or personal interest whatever."

[⁴] This precaution was wholly unnecessary, for he had the right to do what he claimed by the agreement, and he had not the power to deprive himself or his successors of that right.

[⁵] Third. The right of the attorney-general to proceed without notice to the proposed defendant, and to make an *ex parte* application to the court is fixed by the Code. His proceeding is, in a certain sense, analogous to the proceedings of a grand jury. It is in the power of that jury to summon the accused before them, but it is not essential to the validity of the indictment. The sections of the Code (§§ 1798-9) are permissive, not obligatory. The court may direct notice to be given, but it can well be understood that emergencies may arise where the purpose of the action would be [⁶] frustrated if the defendant had notice. After the suit is commenced, the defendant may invoke the action of the court, and may inquire into the regularity of the preliminary proceedings, just as a defendant in a criminal case may question the regularity of the organization of a grand jury and the proceedings to and including the indictment. Such an inquiry in a civil suit would not, however, necessarily result in a dismissal of the proceedings, even if the court should hold that there had been an irregularity. (Mojarrieta *v.* Saenz, 80 N. Y., 553.)

[⁷] Fourth. The application to the court for leave to sue must be in writing, by petition. The court cannot act on a verbal statement. Petitions are constantly presented to the court for leave to sue and are invariably in writing. Whatever is referred to in the petition becomes the basis of the petition, and, therefore, should likewise be in writing, and should be filed with the petition. The reference, therefore, in the petition to papers which are not filed is an irregularity.

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[⁸] Fifth. The order in question having been made *ex parte*, the only method in which it could be brought up for review was adopted by the defendant—that is, to move to set aside the order. This does not, in a legal sense, call upon one branch or term of this court to sit in review of its equal. It is a matter of every-day practice. If it were necessary to defend it in this case, it would be sufficient to say that, *pro hac vice*, the court now sitting is the court that granted the order, the motion having been submitted to the judge who made the order, and he having requested it to be heard by the judge now holding the special term. It is [⁹] not, however, necessary to put it on that ground. It is the due and proper mode of bringing before the court whatever might militate against the order itself, or might have induced the court to have refrained from making the order in the first instance. This motion must stand on the same footing with any other order of like character.

[¹⁰] Sixth. If the positions above taken are correct, it follows as a proper sequence that, whenever the moving party can show any good cause therefor, the order granting leave must be vacated, and the question then presents itself, has any such cause been shown on this motion? The learned counsel insist that they have, both as matter of practice and on the merits. The petition presented purported to have been signed by the attorney-general as follows: "Leslie W. Russell," and was verified by Mr. Nash. It now appears that the attorney-general, in fact, never did sign the petition.

[¹¹] The act of signing such a petition is not a ministerial act, and cannot be delegated. The court has a right to know by the signature of the attorney-general himself that he is the petitioner, and to hold him personally responsible for the act. The action of the court upon the application for leave must necessarily often depend

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upon the reliance that the court places in the solemn conclusion of the attorney-general as manifested by his own written application therefor. And where the attorney-general, by the purity of his character and by the ability that he possesses, as is the case with the present incumbent of that office, obtains the universal confidence of the court, such a petition must commend itself to the favorable consideration of any judge to whom it is presented. No attorney, in fact, no individual petitioner, can delegate to any other person the right to sign his name to any such petition. This is not a common law power, and the attorney-general does not pretend that there is any statutory [12] authority for such a proceeding. We think this a matter of great importance, and that no subsequent ratification by him can validate it; but if the petition itself might be ratified, there cannot be any entrusting the conscience of the attorney-general to the keeping of any private counsel, and there cannot be any swearing to the petition by proxy. How, then, could this verification be ratified? Swearing to it to-day would not ratify the act of yesterday. We are, therefore, of the opinion, that the motion must, for this reason, be granted, without regard to the merits of the motion.

Assuming that the petition was regularly before the court with the accompanying papers, was the leave to sue properly granted? Applications to the court for leave to sue are of frequent occurrence, by persons acting in a private fiduciary capacity, and the courts [13] have by practice regulated these matters. The court never demands the *evidence* upon which the action can be successfully maintained, nor does it, as a rule, require more than the most general statement of the right to maintain an action. It does require the certainty of a complaint. If the attorney-general had signed the petition presented, and that had omitted all

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reference to other papers, and the leave had been granted *ex parte*, according to the practice, this action would have been regularly instituted. Moreover the papers presented, assuming that the conclusions of the attorney-general were correct, demonstrated that that officer would have been exceedingly derelict in duty if he had refused to bring this action. If the acts charged by him were proven, there was a usurpation of power and a violation of law. A corporation cannot extend the franchise granted to it without authority of law, or the consent of the State (*Morawetz on Priv. Corp.*, sec. 537), and this alone would have warranted the interference of the attorney-general. And if this action can be maintained, and the facts therein set forth be established, the action of the attorney-general will be justified. It is not the duty of the court to determine either of these questions in advance. The court may rely upon the judgment of the attorney-general in both respects. If he has brought an action that has no legal merit, the defendant can have that determined by a demurrer. If the action has no merit as matter of fact, that can be determined by a trial.

In what has been said, this court does not presume or intend to be understood as passing upon these questions.

[¹⁴] Because of the fundamental irregularities above set forth, the motion to set aside the order complained of must be granted, with leave to the attorney-general to take such further action in respect thereto as he may be advised, on payment of costs of the motion; and, in view of the contention had before me, I suggest that the defendant have notice of such action.

People v. Metropolitan Telephone and Telegraph Company.

THE PEOPLE OF THE STATE OF NEW YORK
v. THE METROPOLITAN TELEPHONE AND
TELEGRAPH COMPANY.

SUPREME COURT, FIRST DEPARTMENT, CIRCUIT;
OCTOBER, 1882.

Chap. 357 of the Laws of 1848.

Right of attorney-general to appear by special counsel.—Cannot so appear at a circuit court.—Action by people in such court, must be tried by attorney-general or one of his deputies.

Under chapter 357 of the Laws of 1848, the attorney-general has no right to appear by special counsel on the trial of a case at a circuit court.* The language of section 3 of chapter 357 of the Laws of 1848—“The attorney-general shall be, and hereby is authorized to employ additional counsel in prosecuting and defending suits and proceedings in which the people are a party, or are interested, at any general or special term, or at chambers of the supreme court, in any of the judicial districts of the State, whenever the discharge of other official duties shall prevent him attending in person”—does not include the trial of a case at a circuit court; [1] and the defendant in such court, in an action brought by the people, has a right to insist, for his own security, that the action shall be tried by such counsel as are, beyond all dispute, entitled to represent the State; viz., the attorney-general or one of his lawfully authorized deputies. [2] [3]

Motion by defendant at circuit to postpone the trial, because the attorney-general was not present to conduct the same on the part of the people, either in person or by lawfully appointed deputy.

The facts are sufficiently stated in the opinion.

Burton N. Harrison, for defendant.

L. E. Chittenden, for plaintiff.

LAWRENCE, J.—In the case of The People of the State of New York against The Metropolitan Telephone

* See note, *ante*, p. 295.

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and Telegraph Company, which is an action brought for the purpose of having it judicially determined, "that certain poles, now erected, or intended to be erected, in a certain street in the city of New York, be declared a public nuisance and an obstruction to the public use of said street; that the said defendant forthwith remove each of said poles, and all the parts of said structure, so, by the defendant, erected in said street, therefrom, and that the defendant restore said street, in all respects, to the condition in which it was previous to such erection; that the said nuisance be wholly abated, and all the parts thereof entirely taken away, so that said street shall be, and remain, as it was before the said nuisance, or structure, was erected; that the defendant and its officers, agents, and servants be restrained, by injunction, from putting any wires or other things upon said poles or any of them, and from erecting any more poles on said Twenty-first street, and from doing anything whatever with said poles, except to remove them; that the plaintiff recover from the defendant \$2,000 damages and the costs of this action," both sides have answered ready, but the attorney and counsel for the defendant have objected that, as the attorney-general of the State is not present, either in person or by his duly constituted deputy, the action ought not to proceed, it being suggested to the court that, under the act of 1848, the attorney-general has no right to appear by special or local counsel on the trial of a case at a circuit court.

I am free to say, that when the point was first suggested to me, I was inclined to think that it was not well taken, for the reason that my own experience and my observation for many years past, have been that in such actions the attorney-general has almost always appeared by special or local counsel. But upon reference to the statute (§ 2 of chap. 357 of the Laws of 1848), I find that it is provided that:

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"The attorney-general shall be, and hereby is authorized to employ additional counsel in prosecuting and defending suits and proceedings in which the people are a party, or are interested, at any general or special term, or at chambers of the supreme court in any of the judicial districts of the State, whenever the discharge of other official duties shall prevent him attending in person."

[¹] It is quite obvious that the language of the statute does not embrace a trial at the circuit court, the language being, "The attorney-general * * * is authorized to employ additional counsel * * * at any general or special term, or at chambers of the supreme court, in any of the judicial districts of the State." This is not a general term or special term, nor is it the chambers of the supreme court, but it is a circuit court. I should have been inclined to think that, irrespective of that statute, the attorney-general had a general power to employ counsel in actions of this character, but the court of appeals in a very recent case have construed the statute, and it certainly would be an assumption on my part, sitting as a circuit court judge and as a member of an inferior tribunal, to undertake to impose a limitation upon the language employed by the court of appeals, which the court certainly have not in terms imposed.

The case to which I refer is, the Matter of the Attorney-General *v.* The Continental Life Insurance Company, which, so far as I have been able to ascertain, has not yet been reported in the regular reports of the court, but which is to be found in *The Daily Register* of the 19th of April, 1882. [Now reported, 88 N. Y., 571.] In that case, special counsel had been employed by the attorney-general in the Matter of the Continental Life Insurance Company, and certain allowances had been awarded to defendant's counsel for serv-

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ices which they were alleged to have performed. It was conceded, on the argument of the case, that the allowances, if it were in the power of the court to grant allowances in such cases, or of the attorney-general to employ special counsel in such case, were reasonable and proper, and the main point on which the case turned was as to the power of the attorney-general to employ counsel. The opinion was rendered by Chief Judge ANDREWS, and was concurred in by all the judges of the court, who were present. In that case, the court say:

"We have not been able to find any statutory authority conferred upon the attorney-general, to appoint special counsel to act generally for him in the conduct of suits or proceedings, in which the State is interested. The Revised Statutes (1 R. S., 165, § 15) authorize the governor, to employ counsel to assist the attorney-general, in any suit or proceeding prosecuted or defended by him, in behalf the State. By chapter 357, Laws of 1848, the attorney-general, is authorized to employ additional counsel, in prosecuting or defending suits in which the people are a party, or are interested, 'at any general or special term or at chambers,' when official duties prevent his attending in person. This statute, as will be observed, limits the authority conferred, to the appointment of counsel to appear at a term of court, or at chambers, and then only when the attorney-general cannot be present in person. We find no other general statute conferring upon the attorney-general authority to employ special counsel on behalf of the State. It seems to be quite plain that the statutes referred to, did not authorize the general retainer under which the petitioner in this case acted. The retainer was not confined to an appearance by the petitioner in court, or at chambers, nor was it made upon the special exigency contemplated by the statute. Independently of the statute, there seems to be no authority vested in

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the attorney-general, to employ special counsel. In view of the statutes regulating the employment of counsel, such authority cannot be deemed to be vested in that officer, as incident to his office. Provision is made for the appointment of deputies to assist the attorney-general. This general provision, and the statute authorizing the governor, or the attorney-general, in certain cases, to appoint special counsel, seem plainly to exclude the inference, of an authority in the attorney-general, to appoint special counsel, outside of the statute."

It will be observed that in that opinion, the court say, that not only is the authority of the attorney-general limited by the express provisions of the statute, but that he has no authority incident to his office to employ counsel. A very elaborate argument was had in this case on this point, on Friday last, and I was much pressed by counsel with the point, that it would be utterly impossible for the attorney-general to perform the duties of his office, if such a construction were given to the statute as is contended for by the defendant's counsel. With that consideration I, of course, cannot deal. The highest court of the State has said that no authority exists in the attorney-general, outside of that statute, to employ counsel, and they have also said, that the statute does not give him power to employ special counsel in such a case as this. And apart from that consideration, even if there were any doubt in my own mind as to the exact force of the language which the [2] court have employed, it is the right of the defendants to insist that, when this action is tried, it shall be tried by counsel who are, beyond all dispute, entitled to represent the State. Should they succeed upon the trial of this action, it is their right to have a judgment which shall be binding upon the State.

Perhaps it is unnecessary for me to say anything more, but I will observe, in conclusion, that the attorney-gen-

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eral himself, in his communication to the legislature dated the 11th day of April, 1882, seems to have concurred in the view which I have expressed, and seems to have put the same construction upon the decision of the court of appeals, in the case to which I have referred, as that which I have put on it. The question was there presented as to the power of the attorney-general, or the State, to have certain cases opened in which orders or allowances had been made, and without reading the whole language of the opinion, I will refer to a portion of it. The learned attorney-general says:

"The court of appeals has this day decided that the attorney-general had no power to broadly authorize the special counsel to represent him, upon the conduct of these litigations, and, therefore, it impliedly follows, that the service of papers on such special counsel, and his various appearances for the attorney-general were unauthorized by law. I am of the opinion that, under this decision, the attorney-general may ask the courts, with propriety, to review the various orders granted, upon the ground that the State has not been legally represented upon the hearing in those cases, where the action was brought by the attorney-general."

In view of that opinion, and in view of the opinion of the court of appeals, I ought not, even if I entertained a doubt as to the construction of this statute, to force these defendants to trial, when, if a judgment should be obtained in their favor, an application might subsequently be presented to the court to open that judgment and set aside the verdict of the jury on the ground that the State had not been legally represented. Therefore, in obedience to the opinion of the court of appeals, I must sustain the objection of the defendant's coun-
sel, and I must direct that this case stand over until the attorney-general or one of his lawfully authorized deputies appears here, on behalf of the State.

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**MANNING, RESPONDENT, *v.* GOULD AND ANO.,
APPELLANTS.**

COURT OF APPEALS; OCTOBER, 1882.

§§ 1335,* 1346, 1351, 1352.

Liability of sureties to undertaking on appeal.—When not bound by conditions of undertaking.—Effect of failure of sureties to justify when excepted to.—What right failure to justify gives respondent.—Respondent cannot have right to disregard appeal and also have benefit of undertaking.

Sureties to an undertaking, given to stay execution of judgment, on appeal to the general term of either the supreme court or a superior city court, from a final judgment rendered in the same court, when excepted to, and they fail or refuse to justify, and their justification is not waived by the respondent, are not bound by the conditions of the undertaking.

Under section 1335 of the Code, failure of the sureties to an undertaking upon appeal to justify when excepted to, entirely defeats the object and purpose of the undertaking; and the respondent has the right to disregard any perfecting of the appeal or stay of proceedings which justification would have assured. A respondent who has thus the right to disregard an undertaking and to enforce his judgment pending appeal, cannot also have the benefit which the undertaking was intended to secure and be permitted to treat it as a valid security and hold the sureties to a liability thereon.

The legislative intent to make the effect of a failure to justify and procure an allowance, when the sureties are excepted to, the same as if the undertaking had not been given, is expressed more strongly in section 1335 of the Code of Civil Procedure than in section 334 of the Code of Procedure.

Query, whether a respondent who has excepted to the sufficiency of the sureties to an undertaking upon appeal may waive his exception, at any time before the refusal of the sureties to justify.†

* Section 1335 was amended by Chapter 397 of the Laws of 1882. It is the amended section which is considered in the opinion.

† Section 1305 provides that: "An undertaking, which the appellant is required, by this chapter, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent."

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1 Civ. Pro. R. (1 *McCarty*), 216; S. C. 47 *N. Y. Super.* 887, reversed.
Decker *v.* Anderson (39 *Barb.* 846), distinguished.
Ballard *v.* Ballard (18 *N. Y.* 401); Gibbons *v.* Berhard (3 *Bosw.* 685); Hill *v.* Burke (42 *N. Y.* 111); Knapp *v.* Anderson (7 *Hun.*, 295, aff'd, 71 *N. Y.* 463); McSpedon *v.* Bouton (5 *Daly*, 80), explained.
(Decided December 12, 1882.)

Appeal by defendants from a judgment of the general term of the superior court of the city of New York, affirming a judgment entered upon a verdict found by direction of the court (Reported below, 1 *Civ. Pro. R.* (1 *McCarty*), 216, and here reversed).

The plaintiff recovered judgment against one Rowland, and said Rowland appealed to the general term, and gave an undertaking to stay the execution of the judgment pending such appeal, and the defendants in this action, Gould and King, were his sureties. The plaintiff excepted to the sufficiency of the sureties, and notice of their justification was duly served for March 4, 1880. On the appointed day, both sureties appeared and were sworn, and the examination of Gould had begun, and was progressing, when news of the death of Rowland was received. Thereupon Gould refused to be further examined and declared that he would not go upon the bond of a dead man, and declined to accept the examination as it then stood and to sign the record thereof. King, who was to have attended for examination upon the following day, then refused to appear and be examined. No further measures were taken by the plaintiff in regard to the justification of the sureties, nor was there any notice of withdrawal of the exception to their sufficiency, or any notice served accepting them as sureties.

The action against Rowland was revived against his administratrix, the appeal prosecuted, and the judgment affirmed at general term. Thereupon this action was brought against said Gould and King, upon their lia-

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bility as sureties to said undertaking. At the trial, the facts stated above were given in evidence, and the defendants moved to nonsuit the plaintiff, and, also, that the jury be directed to bring in a verdict for the defendants. These motions were denied, and a motion by the plaintiff that the jury be directed to bring in a verdict for the plaintiff was granted, against the objection of the defendants.

Nathaniel C. Moak (*Geo. C. Eldredge*, attorney), for appellants:

Cited generally on the point here decided, in addition to the cases given on appeal to the general term and to be found in the report below, *Chamberlain v. Dempsey*, 13 Abb. 421, S. C., 22 How. 356; *Kelsey v. Campbell*, 14 Abb. 368, S. C., 38 Barb. 238; *Hees v. Snell*, 8 How. 185; *Blake v. Lyon*, etc., Manufacturing Co., 75 N. Y. 611; *Rae v. Beach*, 76 Id. 164; *Langley v. Warner*, 1 Id. 606.

Fred. M. Littlefield, for respondent:

Cited generally on the point here decided, in addition to the cases given on appeal to the general term and to be found in the report below, *Babbitt v. Shield*, 10 W. Dig. 289; *McMahon v. Allen*, 32 How. 320; *Crist v. Burlingame*, 62 Barb. 351; *Gates v. McKee* 13 N. Y. 232; *Walrath v. Thompson*, 4 Hill, 200; *Scott v. Duncombe*, 49 Barb. 73; *Sumler v. Wilson*, 1 Md. 144; *Hibbs v. Blair*, 14 Pa. St. 413; *State v. Berry*, 12 Mo. 376; *Barnes v. Webster*, 16 Id. 258; *Sheppard v. Collins*, 12 Iowa, 570; *Van Duyne v. Coope*, 1 Hill, 557; *Flack v. Eager*, 4 Johns. 185; *Andrews v. Herriot*, 4 Cow. 514; 1 Arch. Pr. 310; 1 Tidd's Pr. 258 (9th ed.); *Mills v. Thursby*, 11 How. 113.

TRACY, J.—The question to be determined in this case is, whether the sureties to an undertaking given on

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appeal to the general term of the supreme court or of a superior city court, when excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, are, nevertheless, bound by the conditions of their undertaking. This depends upon the construction to be placed upon sections 1352 and 1335 of the Code. Security is not required to perfect an appeal to the general term from a final judgment rendered in the same court, but such appeal does not stay proceedings upon the judgment, and the party having the judgment may proceed to enforce it as if no appeal had been taken.* If the appellant desires to stay the execution of the judgment pending the appeal, section 1352 of the Code requires that he must give the security required to perfect an appeal to the court of appeals. Upon giving such security, the execution of the judgment appealed from is stayed as upon an appeal to the court of appeals, and subject to the same conditions. Section 1335 of the Code provides, that it is not necessary that an undertaking upon an appeal to the court of appeals should be approved, but the attorney for the respondent may, within ten days after service of a copy of the undertaking, except to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify before a judge of the court below, or a county judge. If the judge, after examination of the sureties, finds them sufficient, he must indorse his allowance of them upon the undertaking or a copy thereof. The section then declares: "The effect of a failure so to justify, and to procure an allowance, is the same, as if the undertaking had not been given."

The meaning of this language is too obvious to admit of doubt. Failure of the sureties to an undertaking

* Section 1351.

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upon an appeal, to justify, when excepted to, defeats entirely the object and purpose of the undertaking. Where security is required in order to perfect the appeal, the appeal from the judgment is not perfected, and the party having the judgment may proceed thereon as if no appeal had been taken. Where security is not required to perfect the appeal, but is required to stay the execution of the judgment, the judgment may be enforced, pending the appeal, as if no undertaking to stay the execution thereof had been given.

So much is clear. The remaining question to be considered is, whether the respondent may insist upon his right to disregard the appeal or the stay of proceedings, as the case may be, because of the failure of the sureties to justify; and, at the same time, hold the sureties upon their undertaking.

We think not. Upon the service of a notice of appeal with an undertaking, the respondent may accept the undertaking, and thereupon it becomes effectual, and the sureties will be bound. But he may say, "I will not accept the sureties tendered by the undertaking, except upon condition that they appear before a judge, are examined as to their responsibility, and the judge approves them after such examination." Thereupon, the appellant may undertake to meet this condition, and give notice of justification of the sureties, or he may tender other sureties in a new undertaking to the same effect, who must justify before a judge of the court below or a county judge. If he does neither, then the case stands as if no attempt to give an undertaking had been made. No reason can be suggested why the respondent should be permitted to disregard the undertaking and proceed upon the judgment as if none had been given, and yet have all the advantages that the undertaking was intended to secure. The only object and purpose of the undertaking was to stay the execu-

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tion of the judgment until the appeal had been heard and determined. The respondent cannot have the dual right to enforce the judgment pending the appeal, as if no undertaking had been given, and, at the same time, treat it as valid security for the payment of the judgment. The undertaking was tendered by the appellant and rejected by the respondent, and never perfected by the appellant. It is unnecessary to determine whether or not the exceptant might have waived her exception at any time before the refusal of the sureties to justify. No waiver in this case was made or attempted.

We have carefully examined the numerous authorities cited by the respondent, and none of them are in conflict with the conclusion reached in this case.

The case of *Decker v. Anderson* (39 *Barb.* 346), arose on an undertaking given upon the bringing of an action to recover possession of personal property, under the Code. The cases are not analogous. In an undertaking given in an action of replevin, the sureties being approved by the sheriff, he is required to take the property of the defendant, and becomes liable to the defendant therefor in case the sureties fail to justify, if excepted to. In such a case, it would be unreasonable to hold that, after the defendant's property has been taken upon the faith of the undertaking, the sureties could relieve themselves from liability by refusing to justify when excepted to. Besides, the Code does not declare that the effect of a failure so to justify is the same as if no undertaking had been given. On the contrary, the effect of a failure to justify is to subject the sheriff to liability to the defendant for the property taken.

Ballard v. Ballard (18 *N. Y.* 491), simply decides that an exception duly taken to sureties on appeal is waived by the failure of the respondent to attend the officer before whom the notice of justification is given, although the sureties also fail to attend. It holds, that the party

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excepting is the actor in the proceeding, and no step is necessary to be taken except upon his requisition.

The question involved in the case of *Gibbons v. Berhard* (3 *Bosw.* 635), was one of pleading. It was there held, that a complaint upon an undertaking, executed upon an appeal to the court of appeals, sufficient in other respects, is not demurrable as not stating facts sufficient to constitute a cause of action, merely because it omits to aver that the undertaking was accompanied by the affidavits of the sureties that they were worth double the sum specified therein. Such affidavit was intended for the protection of the respondent, and it was competent for him to waive it. In *Hill v. Burke* (62 *N. Y.* 111), the respondent accepted the undertaking, and never excepted to the sureties. The only defect the sureties claimed was that they did not originally justify in a sufficiently large amount. *Knapp v. Anderson* (7 *Hun*, 295, aff'd, 71 *N. Y.* 468), decides nothing, except that the discharge of the judgment debtor in bankruptcy did not discharge his sureties. The case of *McSpedon v. Bouton* (5 *Daly*, 30), was an action brought upon an undertaking given upon an appeal to the court of appeals. Although no such defense was set up in the answer, proof was given upon the trial that the respondent excepted to the sureties; and that after repeated attendance by the respondents on notice for their justification, and their failure to attend and justify, the proceedings for justification were abandoned without formal order, and the appeal proceeded, and was regularly heard and disposed of in the court of appeals.

Judge ROBINSON held that the failure of the sureties to justify constituted no defense, and cited *Decker v. Anderson*, 39 *Barb.* 346. But that case, as we have already seen, did not arise upon an undertaking given upon an appeal, and cannot be considered an authority upon the question now before the court.

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We think the court was misled by the supposed analogy of this case.

Furthermore, the language of the Code, under which the undertaking was given in that case, is not the same as the present Code. The intent of the legislature to make the effect of a failure to justify and to procure an allowance the same as if an undertaking had not been given, is more strongly expressed in the present Code than it was in section 334 of the old Code.

The sureties were not bound, and the judgment of the general and special terms must be reversed, and a new trial granted, costs to abide the event.

All concurred.

KNOWLTON ET AL. v. BANNIGAN.

N. Y. SUPERIOR COURT, SPECIAL TERM; OCTOBER, 1882.

§ 872.

Examination of witness not a party, before trial.—What are the "special circumstances" which will justify order for.—Must be an allegation that examination is to be used upon trial.—What is not equivalent to such an allegation.

The "special circumstances" which will justify an order for the examination of a witness not a party to the action, before trial, under subdivision 5 of section 872 of the Code, are circumstances of the same general nature as those mentioned in said subdivision (viz., "that the person to be examined is about to depart from the State; or that he is so sick or infirm, as to afford reasonable ground to believe that he will not be able to attend the trial").

There must, in the superior court, be an allegation that the moving party intends to use the examination upon the trial of the action; and an allegation that the examination is necessary for the prosecution of the action is not sufficient to sustain the order, on the ground that it appears that the examination is to be so used.

Motion to vacate an order for the examination of a witness not a party to the action, before trial.

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The action was brought to recover for goods sold and delivered, and the plaintiffs sought, for the purpose of framing the complaint, to examine the witness who had, as broker, effected the sale. There were no statements in the plaintiffs' moving papers that the witness was about to depart from the State, or that he was sick or infirm, nor was there any allegation that the examination was to be used upon the trial; but there was an allegation to the effect that the examination was necessary for the prosecution of the action, and this, the plaintiffs contended, made it appear that the examination was to be used upon the trial.

Geo. B. Ashley, for motion.

Dill & Candler, opposed.

TRUAX, J.—The plaintiffs seek to examine a person not a party to the action, under subdivision 5 of section 872 of the Code of Civil Procedure, for the purpose of enabling them to frame their complaint, and also to examine him "as to any allegation and all facts necessary to prosecute the action."

In 1877 this court decided that a witness not a party to the action, could not be examined for the purpose of enabling a plaintiff to frame his complaint (*Matter of Bryan*, 3 Abb., N. C., 289). Since that time, the above subdivision has been amended by the insertion of the words, "or that any other special circumstances exist, which render it proper that he should be examined as prescribed in this article." I do not think that the plaintiffs have shown that such special circumstances exist in this case. The "special circumstances" are circumstances of the same general nature as those mentioned in the preceding part of the subdivision.

The allegation in the affidavit that the examination is

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necessary to prosecute the action is not sufficient, as contended by counsel, to sustain the order on the ground that they intend to use the examination on the trial. There must be an allegation that the moving party intends to use the examination upon the trial. If he does not intend so to use it, then there is no reason why the witness should be examined (*Corbett v. De Comeau*, 44 N. Y. Super. 306; *Batterson v. Sanford*, 45 N. Y. Super. 127). In the cases cited by the learned counsel for the plaintiffs, the application was for the examination of a party to the action.

The order must be vacated, with costs.

BEEBE *v.* RICHARDSON ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM ; OCTOBER, 1882.

§ 872.

Examination of party before trial.—Cannot be had, when examination would tend to show that witness had committed a misdemeanor.—When witness cannot be examined.—What affidavit is insufficient.

A party cannot be examined as a witness before trial, when the examination would tend to show that he had committed a misdemeanor. A witness cannot be compelled to disclose any matters which may subject him to a forfeiture or a criminal prosecution, nor can he be compelled to disclose any matter constituting a link in the chain of evidence tending to such consequences.*

An affidavit for the examination of a party before trial, the allegations of which are upon belief, and in which the grounds of belief are not stated, is insufficient.

* For a collection of cases to the same effect, see Note on Examination before Trial, 1 *Civ. Pro. R.* (1 *McCarty*), 75, 91; and see, also, *Russ v. Campbell*, 1 *Civ. Pro. R.* (1 *McCarty*), 41; *Yamato Trading Co. v. Brown*, 2 *McC. Civ. Pro. R.* 6; *Walker v. Dunlevey*, *Id., note.*

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Motion by defendants to vacate an order for their examination as parties before trial.

This was an action in the nature of a creditor's bill to set aside a transfer of property, alleged to have been made with intent to hinder and defraud creditors.

The application was made after issue joined, and it was set forth in the moving papers that without the examination, the plaintiff would be unable to substantiate the allegations of the complaint.

The other facts are stated in the opinion.

Isaac Fromme, for motion.

Jno. Brooks Leavitt, opposed.

TRUAX, J.—The moving affidavit alleges, that the defendants are in possession of information that will show that the assignment to them, which is sought to be set aside, is fraudulent and void, and he seeks to examine them for the purpose of showing that the assignment was fraudulent. This allegation is made on belief, without giving the grounds of, or reason for, the belief. The order must be vacated, with costs, for two reasons: viz., 1. The grounds of the belief are not stated (*Strong v. Strong*, 3 *Rob.* 675; *Hale v. Rogers*, 22 *Hun*, 19; *Elmore v. Hyde*, 2 *Abb.*, *N. C.*, 129, 133); 2. A witness cannot be compelled to disclose any matter which may subject him to a forfeiture or a criminal proceeding, nor to disclose any matters constituting a link in the chain of evidence which may subject him to any of these consequences, *Corbett v. De Comeau*, 44 *N. Y. Super.* 306, 311; *Yamato Trading Co. v. Brown*, 63 *How.* 283, *S. C.* 2 *McC. Civ. Pro. R.* 6; see, also, *Burbank v. Reed*, 11 *Weekly Dig.* 576; *Kinney v. Roberts*, 26 *Hun*, 166; *Phoenix v. Dupuy*, 2 *Abb.*, *N. C.*, 146, 152. The examination would tend to show that the defendants

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had committed a misdemeanor, 3 R. S. [6 ed.], 969, § 3.
Costs are not allowed to but one of the defendants.

N. Y. Superior Court, Special Term; October, 1878.

JUILLARD ET AL. *v.* HAMLIN.

§ 872.

Examination of party before trial. — Where the plaintiffs are in possession of facts enough to enable them to frame the complaint upon information and belief, and the object of the examination is not to collect proof in aid of the action, but to ascertain whether or not they have a cause of action against the defendant, the order will be vacated.

Motion by defendant to vacate an order for his examination as a party before trial.

The facts are sufficiently stated in the opinion.

Mackinley & Altomayer, for motion.

Edward S. Clinch, opposed.

TRUAX, J.—I do not think that the examination of the defendant is necessary to enable the plaintiffs to frame their complaint. The object of the plaintiffs is not to collect proof in aid of an action which they have against the defendant, but to find out, by the examination of the defendant, whether they have an action against him (*Corbett v. De Comeau*, 44 N. Y. Super. 306). They are now in the possession of facts enough to enable them to draw their complaint on information and belief. The order should be vacated, with ten dollars costs. The plaintiffs may have ten days in which to serve complaint.

N. Y. Superior Court, Special Term; October, 1882.

KIRKLAND *v.* Moss.

§ 872.

Examination of party before trial. — Where, in an action by a broker to recover for services in the letting of certain premises, the defendant set forth in his answer that he was an agent and not the principal, and the plaintiff alleged in his moving papers that he desired the examination to prove that the defendant had an agreement with the alleged principal, by which the defendant had full power and authority to make the contract alleged in the complaint, and by which he had an interest in the premises,"— Held, that the allegation was insufficient, there being no statement that there was

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such an agreement, and the allegation merely meaning that the plaintiff desired to prove his case, if he could, from the examination of the witness.

Motion by defendant to vacate an order for his examination.

The action was brought to recover for services rendered as broker in effecting the lease of certain premises. The other facts appear in the opinion.

J. Albert Englehart, for motion.

C. P. Butler, opposed.

TRUAX, J.—The plaintiff seeks to examine the defendant for the purpose of showing that he (the defendant) acted as principal and not as the agent of one Wallack, as alleged by the defendant in his answer. The allegation in the moving papers is, that the "plaintiffs desire to examine the defendant to prove that he had an agreement with the proprietor of the said premises [the alleged principal], by which he had full power and authority to make the contract alleged in the complaint on his sole responsibility, and by which he had an interest in the said premises." This allegation is not sufficient. There is no allegation that there was any such agreement. The moving affidavit simply alleges that the plaintiff desires to prove there was such an agreement, which means they desire to prove their case if they can. Order vacated, with costs.

COULTER *v.* BOWER ET AL.

N. Y. COMMON PLEAS, SPECIAL TERM ; OCTOBER, 1882.

Article 4, Title 1, Chap. 14.

Complaint in action for foreclosure of mortgage upon real property must allege default in performance of condition of bond.—In action for foreclosure, the suit is upon mortgage, not upon bond.—Mortgage is collateral to bond, and can be enforced only when there is default in condition of bond.

In an action for the foreclosure of a mortgage upon real property, a complaint which sets forth the giving of a bond conditioned for the payment of a certain sum, and as collateral security for the payment of such sum, the execution and delivery of a mortgage, but which contains no allegation of a default in the performance of the condition of the bond, is fatally defective.

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In an action to foreclose a mortgage upon real property, the suit is not upon the bond, but to enforce a collateral security, and such security can be enforced only in the case of failure to perform the condition of the bond. The rule of pleading in regard to contracts is, that where a contract is set forth as having been broken, the breach must be averred. The contract between mortgagor and mortgagee is broken, only in default of performing the condition of the bond, and such a breach must be alleged in order that the mortgagee may enforce the collateral security which was given to be resorted to only upon the breach of the condition of the bond.

Demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The facts are sufficiently stated in the opinion.

Geo. W. Stevens, for defendants and demurrer.

Edward M. Shephard, for plaintiff and opposed.

VAN BRUNT, J.—The complaint in this action is for the foreclosure of a mortgage, and alleges the giving of a bond conditioned for the payment of \$5,450, on the 1st day of May, 1861, with interest thereon at the rate of seven per cent. per annum, and, as collateral security for the payment of such indebtedness, the execution and delivery to the plaintiff of a mortgage upon certain premises in the complaint described, and that the said mortgage contained the same condition as the said bond, and in default of payment of the said sum of money, or the interest that might accrue thereon, or any part thereof, the plaintiff was thereby empowered to sell, etc.; that the mortgage was recorded, and that there is now justly due to the plaintiff, upon said bond and mortgage, the sum of \$5,450, together with interest thereon from the 1st of May, 1861.

The defendant in this action has demurred to said complaint upon the ground, among others, that the complaint does not state facts sufficient to constitute a cause of action.

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The defect complained of is, that there is no allegation of default in the performance of the condition of the bond.

It is urged upon the part of the plaintiff, in support of the complaint, that if the facts set forth are sufficient for the statement of an indebtedness, the cause of action is complete, and that upon the trial, in order that the plaintiff should make out a case in the first instance, no other proof would be required than the bond and mortgage themselves, and the evidence of their execution; that the plaintiff is not required to allege any more in his complaint than he will be obliged to prove in order to make out a *prima facie* case upon the trial.

This proposition is undoubtedly true, but the fact that, without any denial of the execution of the bond and mortgage, it would be necessary for the plaintiff to produce the bond and mortgage upon the trial, goes to show that the proper allegations are not contained in the complaint. The fact of the possession of the bond and mortgage by the plaintiff has been held to be evidence and proof that there has been a default in the condition of the bond, if the bond upon its face is overdue;* and the failure to produce the bond upon the trial, in the absence of any evidence going to excuse its non-production, has been held to entitle the defendant to judgment, because of the failure upon the part of the plaintiff to prove that there has been a default in the performance of the condition of the bond.†

It might be very true that if a suit was brought upon the bond alone, that an allegation of default would be unnecessary to entitle a party to a recovery, where the bond had become due by its terms; but in an action to foreclose a mortgage, the suit is not upon the bond, but to enforce a collateral, and the collateral can only be

* To this effect, see Sowarby v. Russell, 4 Abb., N. S., 238.

† To this effect, see Bergen v. Urbahn, 88 N. Y. 49.

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enforced in case of the failure to perform the condition of the bond; and the rule governing pleadings in regard to contracts is, that if the contract is alleged to be broken, the breach must be averred. This is elementary law, and the contract, or mortgage, between the mortgagor and the mortgagee, is only broken in default of the performance of the condition of the bond, and that breach must be alleged in order that the mortgagee may enforce the security which has been given to him to be enforced only upon breach of its condition.

I am of the opinion, therefore, that the demurrer is well taken, and that the complaint is fatally defective in not alleging the breach in the condition of the bond.

The plaintiff, however, may have leave to amend, upon payment of the costs of the demurrer.

**THE PEOPLE EX REL. CAVANAGH, APPELLANT, *v.*
McADAM, JUSTICE, RESPONDENT.**

**SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
OCTOBER, 1882.**

Article 4, Title 2, Chap. 16. §§ 2234, 2238.

Mandamus to compel officer to entertain summary proceedings. — Under what circumstances writ will not be granted. — § 2238, although mandatory, was not intended to deprive officer of original judicial discretion. — Allowance of mandamus is discretionary.

Although section 2238 of the Code requires, that the judge or justice to whom a petition in summary proceedings to recover possession of real property is presented, must thereupon issue a precept, a justice of the marine court, sitting at special term, whose time is required by, and devoted to, the other business of his court having precedent demands upon him as a member of the court, has reasonable excuse for refusing to entertain the application in such proceedings—there being other officers vested with the same power as the justice to whom the peti-

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titioner could regularly apply—and a motion for a peremptory writ of mandamus is properly denied under such circumstances. While the language of section 2238 is mandatory, there is no declaration that the officer to whom the petition is presented must withdraw his time and attention from the other necessary business of his court and entertain such proceedings; and it could not have been intended by said section to deprive the justice of the original discretion vested in judicial officers.

The allowance of a writ of mandamus is discretionary.*
(Decided November 24, 1882.)

Appeal by relator from an order of the special term denying a motion for a peremptory writ of mandamus.

The relator presented a petition in summary proceedings to recover possession of real property, to the defendant, a justice of the marine court, sitting at special term, and requested that a precept be issued in accordance with said petition. The justice refused to issue such precept, and the relator moved before a special term of the supreme court for a peremptory writ of mandamus to compel said justice to issue the precept, and to entertain the summary proceeding.

In opposition to the motion, the justice set forth that the marine court was a court of record having a large and varied jurisdiction, and by law the justices of said court were required to designate terms of court, and to assign justices to preside thereat, and that no justice of said court had been specially assigned to entertain summary proceeding, but that the defendant had been

* From the affirmance of the general term, the relator appealed to the court of appeals. Upon such appeal, the respondent urged, on the authority of People *ex rel.* Faile *v.* Ferris, 76 N. Y. 326; De Barante *v.* Deyermann, 41 *Id.* 355; Foote *v.* Lathrop, *Id.* 358; Platt *v.* Platt, 66 *Id.* 360, 362; In the Matter of Sage, 70 *Id.* 220; People *ex rel.* Slavin *v.* Wendell, 71 *Id.* 171; *Code of Civ. Pro.* § 190, that the granting or withholding of a writ of mandamus rested in the discretion of the supreme court, and that such discretion was not the subject of review in the court of appeals, and that the appeal should be dismissed. The court of appeals accordingly, on January 28, 1888, dismissed the appeal with costs.

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duly assigned to hold the special term of the court at which the application for said precept had been made; that the amount of business transacted at said special term was large, and necessarily occupied most of the defendant's time; that there was no stenographer attached to said term, and that when summary proceedings were tried thereat, in order to have a sufficient record of the testimony, the justice was obliged to take full notes of the testimony, and, as a result, the regular business and orderly proceedings of the term were interrupted and delayed; that there were other officers in the city of New York, who possessed the power to entertain such proceedings and to issue said precept; that where any special reasons were assigned, or where any real necessity existed, the justices of the marine court would entertain such proceedings, but where the amount of rent in arrears was trifling, the petitioner might well resort to a district court, and the marine court should not be required to exercise its jurisdiction to the prejudice of its more important and regular business.

The other facts sufficiently appear in the opinion.

Roscoe H. Channing, for appellant:

Section 2238 of the Code is mandatory, and requires the justice to issue his precept when the petition is presented.

The justice of the marine court was required by section 320 of the Code to act upon the application, and by section 324 that court is always open for the transaction of *ex parte* business. See Rule 20 of the Marine Court Rules.

The law having vested jurisdiction in the justices of that court, they must exercise such jurisdiction when it is properly invoked. The law having given the petitioner a choice of forums, he cannot, because of the

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existence of such choice, be excluded from the particular forum of his selection and be relegated to another, Alexander *v.* Bennett, 60 N. Y. 204; De Hart *v.* Hatch, 3 Hun, 375.

Jurisdiction in summary proceedings is not conferred upon an officer to be exercised or not as may suit his convenience or notion of expediency; and, if the argument of inconvenience were to prevail, other officers might, on the same plea, decline to entertain jurisdiction and the petitioner be left without a forum. However onerous and distasteful this jurisdiction may be, it must be exercised so long as it resides in the officer.

The amount involved does not determine the importance of the proceeding; the petitioner seeks to recover his real property, and the amount involved is wholly immaterial so long as there is something due. By refusing to entertain jurisdiction unless some special reason exists, the justices of the marine court impose a requirement not found in the Code. When the petitioner has brought his application within the statute, no court or judge has the power to insist upon anything additional, and the petitioner is entitled to an exercise of jurisdiction without regard to what may be considered as a sufficient "special reason."

To compel the performance of the specific public duty enjoined upon the defendant by statute, the only remedy of the relator is a writ of mandamus, People *v.* Green, 1 Hun, 1; People *ex rel.* Oelricks *v.* Superior Ct., 10 Wend. 285; People *ex rel.* Debenetti *v.* Clerk of Marine Ct., 3 Abb. 309. The relator does not seek to interfere with the exercise of a discretion, but to compel the justice to exercise his jurisdiction in a case where he has no discretion, The King *v.* Justices of Kent, 14 East, 395. Although the issuing of a writ of mandamus rests in discretion, such discretion is not arbitrary or capricious, and must be regulated by the rules of law,

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and when substantial justice between the parties require it, the writ should be issued, *Fish v. Weatherwax*, 2 *Jchns. Cas.* 215, 217, *note*; *In re Dederick*, 77 *N. Y.* 595; *People ex rel. Lorillard v. Clyde*, 69 *Id.* 603.

Henry Wehle, for respondent :

The writ of mandamus is discretionary (*People ex rel. Faile v. Ferris*, 76 *N. Y.* 326, 328), and should be granted, in general, only where the law affords no other remedy and to prevent a failure of justice (*Clark v. Miller*, 54 *N. Y.* 528, 534); and this rule is specially applicable when the writ is prayed for against a public officer, *People v. Asten*, 7 *W. Dig.* 411. The relator has another forum in which he can obtain full and speedy justice; and if his prayer for the writ is granted, the result will be to bring into the marine court almost all of the summary proceedings business of the city, to the exclusion of the other necessary business of the court.

The supreme court should not interfere by mandamus with the practice of an inferior court, under the circumstances of this case, *Ex parte Brown*, 5 *Cow.* 31; *In re McClelland v. Dowling*, 37 *How.* 394, S. C., 55 *Barb.* 197; *In re Griffin v. The Judges of the Common Pleas*, 2 *How.* 59.

By the Court.—DANIELS, J.—The writ was applied for because the justice declined to entertain an application for summary proceedings to remove a tenant from demised premises for the non-payment of four dollars and fifty cents rent. The time of the justice appears, by his return, to have been required and devoted to other business having precedent demands upon him as a member of the court. And because of that circumstance, he was reasonably excusable for not entertaining the application, although the Code has declared that the judge or justice to whom such a petition is presented

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must thereupon issue a precept (*Code Civ. Pro.* § 2238). For it did not declare that he must also withdraw his time and attention from the other necessary business of the court for that purpose; and while the language of the section is mandatory in its terms, it still could not have been intended to deprive him of the original discretion vested in judicial officers, *Spears v. Mayor*, etc., 72 N. Y. 442.

If he had been the only officer to whom such an application could regularly be made, a very different consideration would arise in the case; but by section 2234 of the Code of Civil Procedure, a variety of other officers were vested with the same power, to whom the relator had the right to apply. And his application for this writ, instead of bringing his case before one of these other officers, indicates the existence of the disposition rather to annoy the justice proceeded against than to invoke the powers of the court for the purpose of redressing and vindicating a legal right. There is nothing in *De Hart v. Hatch* (3 Hun, 375), countenancing such a proceeding; and as the allowance of the writ was subject to the discretion of the court (People *ex rel.* *Faile v. Ferris*, 76 N. Y. 326), that was, under the circumstances presented, very wisely exercised in refusing to order the writ to be issued.

The order should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Matter of Ledwith.

**IN THE MATTER OF THE APPLICATION OF JOSEPH
M. LEDWITH, AN INFANT.**

**SURROGATE'S COURT, COUNTY OF NEW YORK;
JANUARY, 1883.**

§§ 2821, 2823, 2825, 2826.

General guardian of infant over fourteen years of age.—Infant has the right to nominate.—Such right does not give infant power to release himself from parental control, at pleasure.—What must be shown when person other than parent is nominated.—Of what surrogate must be satisfied.

Although a guardian to be appointed upon the application of an infant of fourteen years and upwards, who has no testamentary or general guardian, must, under section 2826 of the Code, be one who has been nominated by the infant, the infant has not the power, by such proceeding, to emancipate himself, at pleasure, from parental control. If either the father or the mother of the infant is known to be living, and his or her appointment is not prayed for, the petition must set forth the circumstances which render the appointment of another person expedient, and the fitness of another person nominated by the infant is not the only question for the surrogate, and unless such expediency be shown, letters should not be granted to such other person.

Before making the appointment of a general guardian, either of the person or of the property of an infant, the surrogate must be satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by such appointment.

An instance of the appointment of a trust company as the general guardian of an infant's property.

Petition by an infant over fourteen years of age for the appointment of a general guardian of his person and property.

The facts are sufficiently stated in the opinion.

Boardman & Boardman, for petitioner.

James Henderson, for respondent.

Matter of Ledwith.

ROLLINS, Surrogate.—The petitioner, who has recently become fourteen years of age, and who has both real and personal estate, sets forth circumstances which, as he claims, render expedient the appointment of a guardian for both his person and his property. His father, who is his only relative residing in this county, is declared by him to be an unsuitable person to receive the appointment, and he accordingly asks that the Union Trust Company of New York be granted letters as the guardian both of his property and of his person.

A supplemental petition so amends the first as to nominate one Mary P. Devlin, in the latter capacity.

The father has appeared in this proceeding, and does not oppose the granting to some other person than himself, of letters of guardianship of the son's property. He suggests, however, that some private individual should receive this appointment rather than the corporation nominated in the petition.

Under the provisions of section 2826 of the Code of Civil Procedure, it is clear that the person who receives the appointment must be one who has been first nominated by the infant himself, in cases where such infant is fourteen years old or upwards. But I decline to sanction the claim which is made by petitioner's counsel as to the proper interpretation of that section. He insists that whenever a child has reached the age of fourteen years and has no testamentary or general guardian, he has an absolute right, even though his parents are living, to demand from the surrogate's court the appointment of a guardian, and of whatever guardian he may be pleased to nominate, provided only, that the nominee must, in the judgment of the surrogate, be a proper person to execute the trust.

I certainly shall not hold, that an infant of fourteen years has this plenary authority to emancipate himself, at pleasure, from parental control, unless the language

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of the law forbids me to give it other interpretation ; and such is by no means the case. This will appear from an examination of that section of the Code, which has been already cited, and of the preceding sections in the same title.

Section 2821 limits the authority of the surrogate to cases and circumstances in which the chancellor could act before the adoption of the Constitution of 1846. Section 2823 requires that, if either the father or the mother of the applicant is known to be living, and his or her appointment is not prayed for, *the petition "must set forth the circumstances which render the appointment of another person expedient."*

These italicized words are manifestly inconsistent with the claim which is here set up. For to require the insertion in the petition of any allegation as to the "circumstances" referred to in the section, would be utterly nugatory if the fitness of the person nominated were the only question for the surrogate's decision. A fair implication from these words alone is, that unless the appointment of some other person than the father or mother is shown to be expedient, no such other person should be granted letters.

That this is the correct construction of that section appears also from the language of section 2825. Before making a decree the surrogate must be "satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property."

As far as the present application asks for the appointment of a guardian of property, it is granted. The respondent's objection to the corporation nominated does not seem to me to be well founded.

Letters may issue, therefore, to the Union Trust Company.

Matter of Kerrigan.

I do not, however, upon the evidence now before me, feel warranted in granting the prayer of the supplementary petition, asking for the appointment of a guardian of the person. I am not satisfied that the interests of the infant will be promoted by my appointing the person whom he has nominated. Indeed, for aught that the evidence discloses, there is no present necessity for the appointment of any person whomsoever.

IN THE MATTER OF THE APPLICATION OF JOSEPH
A. KERRIGAN, AN INFANT.

SURROGATE'S COURT, NEW YORK COUNTY; JANUARY,
1882.

§ 2832.

Revocation of letters of guardianship. — Of infant's person and estate. — When guardianship of infant's person may be revoked. — When guardianship of infant's property may be revoked.

Although, under subdivision 6 of section 2832 of the Code, letters of guardianship of an infant's person may be revoked, when the infant's welfare will be promoted by the appointment of another person, the surrogate's court has no power to revoke letters of guardianship of an infant's estate, merely because, in its judgment, the infant's welfare would be thereby promoted. The guardian of an infant's estate must be disqualified under one of the preceding subdivisions of that section before he can be removed.

Petition by infant for the revocation of letters of guardianship of his person and property, heretofore issued on his application, and for the issuing of such letters to another person.

The facts are sufficiently stated in the opinion.

McMahon & Munger, for petitioner.

E. G. Whitaker, opposed.

Matter of Kerrigan.

ROLLINS, Surrogate.—The petitioner, Joseph A. Kerrigan, a minor over fourteen years of age, asks that Mary O'Beirne, his maternal aunt, be appointed guardian of his person and estate. Neither his father nor his mother is living, and Mrs. O'Beirne is now the guardian of his two sisters of the ages of thirteen and fourteen, respectively. But for the obstacle to which reference will presently be made, I should grant this application, in the belief that that course would be for the best interests of the minor. But it appears that upon his petition one John D. Brown was, on the twelfth of June last, appointed the guardian both of his person and estate.

Letters cannot be issued, therefore, to Mrs. O'Beirne without a revocation of those which are now held by Mr. Brown; and the latter cannot be revoked against the consent of the holder, save for some one of the causes enumerated in section 2832 of the Code. The present petition alleges no facts which would justify the surrogate, within the authority of that section, in removing the present guardian of the infant's estate.

No charge is made that he is pecuniarily irresponsible or that his bond is inadequate, and I am not warranted in assuming that he will, as the petitioner seems to apprehend, misapply any of the ward's moneys that may come to his hands, or that, if he should do so, the rights of the infant would not find full protection in the security of his bond.

The sixth subdivision of section 2832 expressly provides that a *guardian of the person* may be removed by the surrogate "where the infant's welfare will be promoted by the appointment of another guardian." This clause affords additional proof, if any were needed, that so far as concerns the guardian of an infant's *estate*, this court has no power to remove the incumbent, simply because, in its judgment, that course would be pro-

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motive of the infant's welfare. Such an officer must fall under the ban of some one of the previous subdivisions of the section before the authority of the surrogate can be successfully invoked.

So far as the petition asks for the revocation of letters heretofore issued to Mr. Brown, and for the appointment of Mrs. O'Beirne as guardian of the person, it is granted. It is in other respects denied, without prejudice to another application, and without costs to either party.

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N. Y. COMMON PLEAS, SPECIAL TERM; OCTOBER, 1882.

§§ 724, 740.

Amendments.—Of offer of judgment.—Language of § 724.—Amendment of offer of judgment by service of affidavit of attorney's authority, nunc pro tunc, when allowed.

The court has power, under section 724 of the Code, to allow an amendment of an offer of judgment by the service of an affidavit of the attorney's authority, *nunc pro tunc*, although judgment may have been entered in the action.

The language of section 724 is very broad, and it seems, that there is no step in any action or proceeding, which, if imperfectly taken, is not the subject of amendment.

Where an offer of judgment signed by the defendant's attorney was supposed by both sides to be in the proper form, although, in fact, it was not accompanied by an affidavit of the attorney's authority as required by section 740, and there was no pretense that the plaintiff had been misled by the offer, or that he would have accepted it even though regular, and it being claimed by the defendant that the omission to serve the affidavit had arisen from a then recent change in the practice,—*Held*, that the offer might be amended by service of the affidavit *nunc pro tunc*.

Riggs v. Waydell (17 Hun, 515; appeal dismissed, 78 N. Y. 586), distinguished as not having considered the provisions of section 724 of the Code.

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Motion by defendant to amend an offer of judgment by the service of an affidavit of attorney's authority, *nunc pro tunc*.

The action was brought in 1878 to recover for work, labor and services, and judgment was obtained and entered by the plaintiff in 1882.

The attorney for the defendant, under and by the direction of the defendant, subscribed and served an offer of judgment, but he omitted to serve therewith an affidavit of his authority to make such offer on behalf of the defendant, as required by section 740 of the Code. The plaintiff failed to obtain a judgment more favorable than that contained in the offer, and the defendant now moved to be allowed to serve such affidavit, *nunc pro tunc*, and that the amount of costs taxed in the action be reduced, on the ground that at the time when the offer was made, the practice under the Code of Civil Procedure was new, and the requirement in respect to the service of the affidavit had escaped attention.

The other facts appear in the opinion.

L. J. Conlan (Joseph P. Fallon, attorney), for motion.

S. Jones (James P. Albright, attorney), opposed.

VAN BRUNT, J.—This is a motion to allow an amendment of an offer of judgment *nunc pro tunc*.

My first impression upon the argument of this motion was, that the court had no power to allow the amendment asked for; but an examination of section 724 of the Code seems to lead to the conclusion, that there is no step in any action or proceeding, which, if imperfectly taken, is not the subject of amendment. The last clause of this section provides, that where a proceeding taken by a party fails to conform to a provision of the Code of Civil Procedure, the court may, in its discretion, and upon such terms as justice requires, per-

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mit an amendment thereof to conform it to the provision. It would be difficult to conceive of language which could make the power of amendment more universal. It is true, that in the case of *Riggs v. Waydell* (17 Hun, 515), the learned justice at the special term held, that the court had no power to permit such amendment, and that the general term concurred in this opinion; but the sweeping language of section 724 is not considered or in any way referred to. The court of appeals, in affirming the order of the general term [78 N. Y. 586, dismissing appeal in *Riggs v. Waydell*, *supra*], in no way intimate any opinion upon the question of power. In view of the broad language of the last sentence of section 724 of the Code, I am of the opinion that the court has the power to allow the amendment.

The next question presented is: Should the power be exercised?

In view of the fact that the offer was supposed to be in proper form by both parties, in view of the fact that there is no pretense that the plaintiff has been, in any respect, misled by the informality of the offer, or that he would have accepted the offer if in proper form, and that the change in the practice was but recent, I think that the amendment should be allowed.

The question of terms is the one of great difficulty, so as to preserve the rights of both plaintiff and defendant. I have come to the conclusion, that the defendant should not have against the plaintiff any affirmative judgment for costs, and that the defendant should pay one-half of the fees of the referee.

Motion granted upon defendant stipulating to pay one-half of the referee's fees, and not to tax any costs as against the plaintiff.

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**DOW ET AL., APPELLANTS, v. DARRAGH,
RESPONDENT.**

COURT OF APPEALS; DECEMBER, 1882.

§§ 1315, 3301.

Papers on appeal to court of appeals.—Return must be certified by clerk of court below.—§ 3301, as amended by chap. 399, Laws 1882, does not dispense with clerk's certificate.—Stipulation by attorneys, to what limited.—Rule 1 of the court of appeals.—By whom return must be made.

Section 1315 of the Code and rule 1 of the court of appeals require the return to that court to be certified by the clerk of the court from which the appeal is taken, and the appeal must be heard upon such certified return. And while, under section 3301, as amended by chapter 399 of the Laws of 1882, the attorneys for the parties may, in respect to a paper in which the parties alone are interested, stipulate as to its being a copy, and so dispense with the clerk's certificate, such amendment was not intended to alter the effect of section 1315 and rule 1, and a case for the court of appeals cannot be made up by stipulation between the attorneys, and the return should be made by a responsible officer under the sanction of his official oath and his responsibility to the law.*

(Decided December 15, 1882.)

* The clerk of the court below cannot be compelled to accept the return to the court of appeals as prepared for his certificate by the parties or their counsel. The clerk has a duty to perform in seeing that the return is a proper one, and for such services he is entitled to charge not less than five cents for each folio of the return. This rate is allowed by § 3301 of the Code, and was probably intended as a check upon frivolous appeals. "The case reported in 5 *Hou.* 1 [Clerk's Fees], does not conflict with the foregoing views, for it simply holds that after a charge of five cents for every hundred words has been made, no additional charge for the certificate or for the signature to the certificate, can be made." *Chambers v. Appleton*, 47 N. Y. Super. 524. *Approving Matter of Townsend v. Nebenzahl*, reported *infra*.

A statement in a case on appeal to the court of appeals, that "return certified as required by law," cannot be accepted as a substitute for the clerk's certificate. A case which does not contain a certificate of the clerk

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Motion by appellants to require the clerk of the court of appeals to place the cause upon the calendar.

The appeal was from a judgment of the general term of the superior court of the city of New York. The attorneys for the parties, on appeal to the court of appeals, stipulated under the concluding paragraph of section 3301, as added by chapter 399 of the Laws of 1882, that the case and exceptions, notice of appeal, etc. — all the papers contained in the appeal book — were true copies. The clerk of the court of appeals refused to put the cause upon the calendar, on the ground that his duty required him to see that all the papers presented to the court were in the form prescribed by law and by the rules of court, and that the papers on this appeal should have been certified to by the clerk of the court below and should bear his certificate, and that the appeal book, not containing any such certificate,

of the court below, or a copy of such certificate, is defective. *Matter of Assignment of Bailey*, 85 N. Y. 629.

The clerk's return entire, including his certificate or verification that the papers returned are copies of the original, should be printed. But where nothing is omitted from the certificate but the word "copy" and the name of the clerk, the case may be amended. *Farmers' Loan, etc., Co. v. Carroll*, 2 N. Y. 566, S. C., 4 *How.* 211.

An omission to insert a copy of the clerk's certificate in the return may be supplied by amendment. *Beecher v. Conradt*, 11 *How.* 181.

Where a defective return has been made, the remedy is to move under Rule 3 of the court of appeals for a further return (unless the defect has arisen from the misconduct of the appellant, *McGregor v. Comstock*, 19 N. Y. 581), and the appeal cannot be dismissed under Rule 7 of the court of appeals, unless there has been a total failure to serve any case within the prescribed time. *Bowers v. Tallmadge*, 23 N. Y. 166, S. C., 20 *How.* 516; *Bliss v. Hoggson*, 84 N. Y. 667; *Beecher v. Conradt*, *supra*.

The case returned to the court of appeals must be the same as that upon which the appeal was heard at the general term (except, of course, the additional papers required by Rule 5 of the court of appeals). *Johnson v. Whitlock*, 13 N. Y. 344; *Westcott v. Thompson*, 16 *Id.* 613; *Catlin v. Cole*, 10 Abb. 387, S. C., 19 *How.* 82; *Smith v. Grant*, 17 *How.* 881; *Jaycox v. Cameron*, 49 N. Y., 645.

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was irregular, and the cause would not be placed upon the calendar.

Notice of the motion was served upon the clerk of the superior court, on the ground that he was interested therein to the extent of the fees for making the return.

Stanley & Clark, for appellants and motion:

Urged that section 3301, as amended by chapter 399 of the Laws of 1882, permitted the attorneys for the parties, by stipulation, to make the case and dispense with the certificate of the clerk of the court below; that the object of the statute was to lessen the burden of litigation and should be liberally construed; that the said amendment to section 3301 repealed so much of the

The case of the Matter of Townsend *v.* Nebenzahl, upon which the decision in Chambers *v.* Appleton, *supra*, is based in part, is here reported for the first time. It has frequently been referred to as defining the functions of the clerk of the court below in making the return to the court of appeals; and, also, as determining the amount of the clerk's fees for such service. But so far as the opinion might seem to warrant the practice of unqualifiedly adopting and certifying the return as prepared by the parties, it may perhaps be called in question by Dow *v.* Darragh, *ante*, in which case it is said by the court of appeals: "But they [the attorneys for the parties] cannot by stipulation make up a case for this court. * * * The return to this court should be made by a responsible officer under the sanction of his official oath and his responsibility to the law. Any other practice would be extremely unwise and mischievous." From this language it might be inferred that the duty of making the return must be officially performed by the clerk, and cannot be delegated—at least not to the extent of allowing the parties to determine what papers shall constitute the return. It has long been the general practice, at least in the first department, for the attorney to prepare the papers forming the return, and for the clerk to merely compare the papers so prepared with the originals on file, and to give the usual certificate. For thus comparing, the clerk now charges at the rate of five cents per folio, without any additional charge for his certificate. It has, also, long been the practice for the attorney to transmit the return to the court of appeals, although that act would seem, under section 1815, to be the duty of the clerk of the court below, which the party interested in the return must cause to be performed.

For returns to writs of error under the *R. S.*, see 2 *R. S.* 598, 599; to

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Code as was in conflict therewith. *Dash v. Van Kleeck*, 7 Johns. 497.

Blanchard & Miller, for respondent, not opposing.

Thos. Boese, Clerk of Superior Court, not opposing.

E. O. Perrin, Clerk of Court of Appeals, opposing.

EARL, J.—Section 1315 of the Code requires that the return to this court shall be certified by the clerk of the court from which the appeal is taken, and that the appeal must be heard upon such certified return. Rule 1 of this court makes the same requirement. Section 3301 of the Code provides for the compensation to be made

certiorari and error in certain cases, *Id.* 404; on appeals from surrogate's courts, and in chancery, *Id.* 608, 609; Chancery Rules 118, 119 of the revision of 1844; in equity suits brought before the code practice, Farmers' Loan, etc., *Co. v. Carroll*, 3 N. Y. 566; *McIntyre v. Warren*, 3 Keys, 185. For the fees of the clerk on returns, under the *R. S.*, as enacted, see 3 *R. S.* 638. Section 1315 of the Code of Civil Procedure is the substitute for section 328 of the Code of Procedure.

Supreme Court, First Department, Special Term; May, 1880.

MATTER OF TOWNSEND AND ANO., Appellants, *v.* NEBENZAHL AND ANO., Respondents.

§§ 1315, 3301.

Fees of clerk for making return on appeal to court of appeals are the same in a special proceeding as in an action.—Duty of clerk in making return cannot be converted by agreement of parties or counsel into merely certifying the papers as prepared by them.—Clerk may adopt and certify return as prepared for him, but is not bound so to do.—If he does so adopt, he can only charge a fee for his certificate; but if he does not adopt and makes the return himself, he is entitled to charge the legal rate of fees, which does not seem to be less than five cents for each folio of the return.

Motion by complainant and appellant to compel the clerk of the supreme court to accept and certify a return on appeal, in a special proceeding, to the court of appeals, prepared and consented to by counsel for the parties, upon payment of a fee for his certificate only.

The clerk refused to certify the papers until he had compared them

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to clerks of courts of record for services to be rendered by them. That section was amended by chapter 399 of the Laws of 1882, by adding to the end thereof as follows: "Where the attorneys for all the parties interested, other than parties in default or against whom a judgment or final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate, *as to the parties so stipulating*, and the clerk is not required to certify the same or entitled to any fee therefor." We do not think that this was intended to alter the effect of section 1315 or the rule

with the originals on file in his office and had examined the proposed return, and for such services he claimed to be entitled to five cents per folio.

North, Ward & Wagstaff, for complainant and motion.

Blumenstiel & Hirsch, for defendant, not opposed.

Wm. A. Butler, Clerk, opposed.

DANIELS, J.—The motion in the case involves the right of the county clerk to fees on a return required to be made to an appeal taken from a decision made by the general term to the court of appeals. The counsel have agreed upon the form and substance of the return, and the clerk has been asked simply to certify the papers designed to form the return. For that it is proposed to pay him simply the fees prescribed for making the certificate. He has declined to make it on such terms, and claims the fees prescribed for making the return itself.

Before the present system of practice was adopted, the several clerks were, in all cases, entitled to charge their fees by the folio, for making returns to appeals in chancery, or to writs of error, or *certiorari*. These included the several modes by which the decisions of one court were reviewed by another, and they comprehended special proceedings as well as actions at law and in equity. The proceedings by which the reviews of decisions were previously made have been changed to one uniform system, in the court of appeals. It is now secured by an appeal, as well in special proceedings as in actions at law and in equity. The form, but not the substance of the proceeding, has been changed; and the change has extended no farther than the substitution of a new system for the

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of this court. Where the parties to such a stipulation alone are interested, the stipulation will take the place of the clerk's certificate.

But they cannot by stipulation make up a case for this court, until the law shall be further changed. The returns to this court should be made by a responsible officer under the sanction of his official oath and his responsibility to the law. Any other practice would be extremely unwise and mischievous.

The motion should be denied.

All concurred.

preceding writ or error and *certiorari*. No change was made in the right of the clerk to his fees. They were left unaffected, and so was the duty of that officer in the obligation created that he should make a return. That is the legal and regular mode by which the proceedings in one court are presented for the action and review of another. This duty of the clerk is onerous and laborious, and when he performs it, he is entitled to the fees prescribed by law. They are apparently uniform by the way of remunerating these services; and they should be, as there is no substantial difference in what is to be done, whether the return is to be made in an action or a special proceeding. The duty and the labor are the same, and the law does not appear to make any distinction whatever in the rate of compensation provided for them.

The duty of making a return when an appeal has been taken is fixed and settled by the law and rules governing the practice of the courts; and no authority is given by either to the parties or their counsel, under which they can so far control it by any agreement or stipulation not assented to by the clerk, as to convert this duty into one of merely certifying the papers prepared and accepted by them. Neither the law nor the practice has transferred to them that degree of control over the action or conduct of the clerk. He, of course, may adopt what they have done, and certify the return as it has been prepared for him. But he is not bound to do so. If he should do so, then the fees for the certificate are all that can be charged. But if he does not, and whether he shall or not is purely voluntary with the clerk, then his legal duty remains of making the return himself; and for that he is entitled to charge the legal rate of fees, which does not seem to be less than five cents for each folio of the return.

The application must be disposed of on the basis of this conclusion; and, so far as it is made for an order directing these papers to be certified for the mere fee of making the certificate, will be denied, but without costs.

MCCARTY'S CIVIL PROCEDURE REPORTS. 345

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THE PEOPLE OF THE STATE OF NEW YORK,
APPELLANT, v. THE N. Y., LAKE ERIE AND
WESTERN R. R. CO., RESPONDENT.

THE PEOPLE OF THE STATE OF NEW YORK,
APPELLANT, v. THE N. Y. CENTRAL AND HUD-
SON R. R. CO., RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
OCTOBER, 1882.

§§ 750, 1993, Article 4, Title 2, Chap. 16; Chap. 140,
Laws 1850.

Order to show cause.—Motion on, comes before court same as upon ordinary notice.—Right to open and close argument on such motion, when objection in nature of demurrer ore tenus is made.—To what, motions to quash apply.—What is admitted by demurrer ore tenus.—Practices on moving to quash alternative writ of mandamus.—Railroads are public highways.—How ownership of, may be vested.—Duty to public not affected by private ownership.—Chap. 140, Laws of 1850, is general charter of, and authorizes incorporation of, for "public use."—What accommodations for transportation of passengers and freight required by act.—Right of State to compel performance of duty of transporting.—Eminent domain.—Control of State over highways.—Mandamus in behalf of State will lie to compel carrying of freight.—Attorney-general is proper officer to move for.—Right of State to proceed for, by what not affected.—When State has no other adequate remedy.—Form of writ in such case, what it need not contain.—Construction of § 28, Chap. 140, Laws 1850, as amended by Chap. 133, Laws of 1880.—When railroad corporation cannot suspend functions as carrier of freight on account of a strike by its employees.—In respect to a subsequently occurring event, how general term will be governed in disposing of appeal; and from order erroneously denying application for mandamus, to what appellant is entitled.

Where, at special term, on the hearing of a motion upon an order to show cause why a peremptory writ of mandamus should not be issued, the service of such order having been directed in less than eight days from the return thereof, the defendant, without presenting any papers

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in opposition, raised the objection, as a preliminary one, that the moving papers, consisting of a petition and affidavits, failed to show any grounds entitling the complainant to the relief prayed for, and thereupon moved to quash and dismiss the said order to show cause and petition, and the court entertained such motion, and awarded to the defendant, against the objection of the complainant, the right to open and close the argument thereon.—*Held*, that the motion on the order to show cause came before the special term precisely as though brought on upon ordinary notice, the order to show cause simply limiting the time of notice to less than eight days ['] ; that motions to quash usually apply to existing writs or process and not to mere attempts to obtain them ['] ; and if the defendant, when appearing in answer to the motion, were willing to have come to a hearing upon the complainant's papers, the usual and proper course was to have proceeded with the motion upon those papers, the moving party, the complainant, holding the affirmative and being entitled to open and close ['] ; that there being nothing to quash, the objection raised by the defendant was simply an assertion that the complainant was not, upon his own showing, entitled to have the motion granted, and did not change the rights of the parties as to the order in which they should be heard ['] ; that although upon the hearing of a motion at special term, it is not very material which party opens and closes the argument, and the general term, on appeal, will inquire into the correctness of the decision only where the order grants or denies the relief sought by the motion, still the practice adopted by the special term in this case should be disapproved as a precedent. [","]

The course pursued by the defendant in meeting the motion for the writ, as above described, was in the nature of a demurrer *ore tenus* to the petition and affidavits of the complainant, and admitted the material and well pleaded allegations therein contained. [",","]

The practice on moving to quash an alternative writ of mandamus stated. ['] Railroads are in every essential quality public highways created for public use, and permitted to be owned, managed and controlled by corporations formed for such purpose, because the best and most advantageous enjoyment thereof can be secured to the public through corporate ownership, management and control. [","]

The ownership of railroads, as bodies corporate, may be, and usually is, private, and vested in the owners of their capital stock, and the management of such a corporation may be intrusted to such officers or agents as the stockholders and directors may, under the provisions of law, appoint. In this sense they are to be regarded as private or trading corporations, having for their object the profit or advantage of the corporators. But the object of their creation is different from that of ordinary private or trading corporations, and the circumstances of

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private ownership, profit and control do not conflict with their duties and obligations to the public. [¹⁶]

The general railroad act (Chap. 140 of the Laws of 1850) which authorizes the organization of corporations for the purpose of constructing, maintaining and operating railroads for "public use," may now be regarded as the general charter of all such corporations; and the duty of furnishing sufficient accommodations for the transportation of all passengers and property, upon the payment of the freight or fare, is imposed by the act as a public trust. [¹⁸]

The duty of carrying freight and passengers is the great and sole public good for which railroad corporations are created; and, to facilitate and further the discharge of such duty, all their powers and other duties are given and imposed. [¹⁹] The power and obligation of the State to compel the performance of this duty rest upon the grounds that the common right of all the people to travel and carry upon every public highway of the State has, in the particular instance of railroads, been converted by the legislature, for adequate reasons, into a franchise to be exercised in the transportation of passengers and freight for the public benefit, by and under the management of a corporate body, to the exclusion of all other persons; that the duty is a public trust conferred by the State and accepted on the part of the corporation, either by the contract expressed in the corporate charter or by that implied from the acceptance of the franchise, whereby the corporation becomes an agency of the State to perform public functions which might otherwise be devolved upon public officers. [^{20, 21, 22}]

The restriction on the power of the State to grant the right of eminent domain, except for a public use, stated. [^{23, 24, 25, 26}]

The control of the State over, and its duty with respect to, public highways, stated. [^{24, 25, 26, 27, 28}]

The difference in the relations which exist between a carrier upon an ordinary highway, the State and a private person, and those which exist between a carrier by railroad and the same parties, stated. [²⁹]

A writ of mandamus will lie in behalf of the State to compel a railroad corporation to perform its duties as a carrier of freight and passengers, and the attorney-general is the proper officer to invoke the power of the court. [^{30, 31, 32}]

That the State may suffer no direct pecuniary injury is not the test whether proceedings for the writ should be brought, for whenever public functions vested by the State for the general good are not used, misused or abused, the sovereignty of the State is affected, and, in a legal sense, the entire body politic injured, and it becomes the duty of the State to require the proper performance of such functions. The State is not bound to inquire whether some of its citizens have thereby received special injuries for which they may maintain private actions

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for damages, and the fact that individuals have been injured and may maintain such actions does not preclude the State from the remedy of mandamus. [^{20, 21, 22}.]

Where the injury complained of is confined to a single person, and under circumstances which do not affect the general public, the courts, in the exercise of their discretion, have properly refused the remedy of mandamus on the relation of the injured party — he has an adequate remedy by private action for damages. But the case of *People ex rel. Ohlen v. N. Y., Lake Erie & Western R. R. Co.* (23 Hun, 533), is not an authority for denying the writ to the attorney-general, where there has been a neglect or refusal on the part of a corporation to exercise its franchise to an extent which affects the interests of a great number of citizens and continues for a considerable period of time; nor is that case authority for denying the writ to the attorney-general, where the people move in their own behalf to compel, in any case of neglect or refusal, the exercise of a public franchise which the interests of the people require to be kept in vigorous and efficient use. And where a quite general and largely injurious neglect and refusal by a railroad corporation to perform the duties of carrier appear by uncontradicted allegations, a strong case is shown for the interposition of the State. [^{23, 24}.]

In such a case, the State has no adequate remedy except by mandamus; for although it may take measures to terminate the corporate existence, that proceeding is not an adequate remedy, because it only destroys the functions which the public interests require to exist and be enforced. [²⁵.] The State having an election of proceedings, a sound discretion is vested in its law officer to decide which proceeding affords the remedy called for by the exigency of the case, and for the court to ultimately determine whether the election shall be applied. [²⁶.]

Where a peremptory writ of mandamus is invoked by the people in their own behalf, to compel a railroad corporation to resume the discharge of its duties as a carrier, under its existing rules and regulations, there is no necessity that the form of the writ should specify what kinds of goods, or whose goods, should be first received and carried, or to take any notice of the details of the established usage of the corporation. Upon the return of the writ, all questions in respect to whether that which has been done is a sufficient compliance with its command, may properly arise and become the subject of further consideration. [²⁷.]

While the provisions of § 28 of Chap. 140 of the Laws of 1850, as amended by Chap. 138 of the Laws of 1880, which confer upon railroad corporations the power "to regulate the time and manner in which passengers and property shall be transported," vest a discretion in the corporation with respect to those matters, still the statute cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight, and it does not interfere with the power of the

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court to grant a writ of mandamus to compel the performance of such duty. The language of Railroad Commissioners *v.* Portland & Oxford R. R. Co. (63 *Maine*, 289), adopted. [²³]

A railroad corporation cannot neglect or refuse to perform its public duties as a carrier because of a controversy with its skilled employees as to the rate of wages, which results in a strike — no acts of violence or unlawful interference on the part of the strikers being shown, and it not appearing that the corporation was resisting some unlawful efforts to coerce its actions, and had used all the means in its power to employ other men in sufficient numbers to do the necessary work. That such a controversy exists as to the rate of wages, is no excuse; the public duties imposed upon the corporation must be performed without regard to the cost thereof. [⁴¹⁻⁴⁴]

A state of facts under which it is error to deny an application by the State for a writ of mandamus to compel a railroad corporation to resume the exercise of its functions as a carrier of freight, set forth. [^{27, 28, 41, 44}]

Instances where the writ of mandamus has been issued to compel railroad corporations to perform particular acts. [²⁸]

The general term in disposing of an appeal will be governed by the record, and not by any subsequently occurring events; and where, on appeal from an order erroneously denying an application by the State for a writ of mandamus to compel a railroad corporation to resume the exercise of its functions as a carrier of freight, it does not appear by the record, but is suggested by the respondent, that the time when the writ would be efficacious has already passed, the appellant is nevertheless entitled to have the order reversed, as being prejudicial to the rights possessed at the time when the application was made and hurtful as a precedent, and to be indemnified, in the discretion of the court, for the costs of the appeal made necessary by the erroneous order. [⁴]

63 *How.* 291, reversed.

(Decided January 17, 1883.)

Appeals by the people from orders of the special term, granting motions by the defendants to quash and dismiss petitions and orders to show cause why peremptory writs of mandamus should not issue, and denying the applications for such writs. (The facts in both cases are substantially the same, and the appeals were heard together. Reported below, 63 *How.* 291, and here reversed.)

These proceedings were brought by the attorney-gen-

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eral, in behalf of the people, to compel each of the defendants "to forthwith resume the discharge of its duties as a common carrier; and, also, forthwith to resume the exercise of its franchises, by promptly receiving, transporting and delivering all such freight and other property as may be offered to, or heretofore received by, the said railroad company for transportation, at its stations, in and to the city of New York, upon the usual and reasonable terms and charges." On the petitions of the attorney-general, supported by numerous affidavits, orders to show cause why peremptory writs of mandamus commanding the defendants to proceed as above set forth, were granted, returnable at special term in less than eight days.

The motions upon the orders to show cause coming on to be heard, after the counsel for the people had stated the object of the proceeding and the contents of the moving papers, the defendants, without presenting any papers in opposition, raised a preliminary objection that the moving papers failed to disclose any ground entitling the people to the relief prayed for, and thereupon moved to quash and dismiss the petitions and orders to show cause. The court decided to entertain such motion; and, against the objection of the people, accorded to the defendants the right to open and close the argument thereon. Subsequently the court delivered an opinion in favor of the defendants' motion to quash, and orders were entered sustaining the preliminary objection, denying the applications of the petitioner and granting the motion to quash and dismiss the petitions and orders to show cause.

The neglect and refusal of the defendants to receive and transport freight in the regular course of business grew out of a controversy between the defendants and certain of their employees, in regard to the rate of wages, which resulted in what is known as the "freight-

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handlers' strike," an event which occurred in the month of June, 1882. At the time when these proceedings were begun, the strike had been going on for about two weeks. The freight-handlers, who are laborers employed in and about the work of loading and unloading of cars, etc., received wages at the rate of seventeen cents per hour for a day's work of ten hours, and they demanded an increase to the rate of twenty cents per hour. To this demand the defendants refused to accede, and such refusal was followed by the strike on the part of the freight-handlers. It appeared that an experienced freight-handler could deal with an amount of freight varying from thirty-five to forty tons per day, which was more than could be done by five inexperienced men, such as the defendants had put in the place of their skilled laborers engaged in the strike.

In relation to these matters, the petition of the attorney-general set forth (for example, with respect to the N. Y. Central & Hudson River R. R. Co.), "That the reason which the said corporation alleges as the ground for its refusal to accept, transport and deliver freight and property as aforesaid is, that the persons in their employ handling said freight refused to perform their work, unless some small advance, said to be three cents per hour, is paid them by said railway corporation; * * * that such advance, if granted, would make a difference not in excess of about \$300 a day to said railway company, and that the damage inflicted upon the commerce of the city, county and State of New York, by reason of its refusal to accede to such request, or to obtain adequate skilled labor to perform the services in lieu of the men employed at the present time, amounts to a very large sum of money, corresponding to which said additional expenses to said company are very insignificant."

The petition of the attorney-general also alleged:

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"That the damage caused to the community and people at large, by the action of said railroad corporation, is not remediable at common law, nor by any ordinary proceedings in equity ; but results in great inconvenience and expense to many citizens, and effects a large diversion of trade from the State of New York, to the permanent injury of its commerce, for which private actions can afford no adequate or proper remedy or redress."

The strike ended by the freight-handlers resuming work at the existing rate of wages, before the argument of this appeal.

In the following opinion of the general term it is [45-46] said : "We are not able to perceive the difficulties that embarrassed the court below as to the form of the writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done ; but the thing to be done in this case was to resume the duties of carriers of goods and property offered for transportation. * * * There was no necessity to specify what kinds of goods should be first received and carried, or whose goods ; or, indeed, to take any notice of the details of the established usages of the companies." The difficulties referred to are set forth in the opinion of the special term as follows : "The order to show cause asks that the defendant's corporation be required to forthwith resume the discharge of its duties as a common carrier ; and, also, forthwith to resume the exercise of its franchises by promptly receiving, transporting and delivering all freight and other property as may be offered to, or hereafter received by, such company, etc.

"Section 28 of the general railroad act, as amended by Chapter 133 of the Laws of 1830, provides that every corporation formed under this act shall have power 'to regulate the time and manner in which passengers and property shall be transported.'

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"Under this statute, a discretion is given to the corporation to regulate the time and manner for transporting the property that shall be tendered to it. Doubtless this discretion must be exercised reasonably, and so as not to cause damage to shippers or consignees. This discretion seems to be necessary. Many kinds of property are presented for transportation. Some have to be transported with great dispatch, as in the case of live stock, fruits, vegetables and articles of a perishable nature. Unperishable freight must, of necessity, give way to perishable articles. Again, large and unusual quantities of freight oftentimes are presented in a single day, without notice to the corporation. Reasonable time must, therefore, be given to enable the company to get its cars to the place of delivery and transport the same.

"The writ of mandamus when it is issued must clearly and distinctly state the act or duties by it commanded to be performed, so that the party to whom it is addressed may distinctly understand what he is to do. If he fails or neglects to perform, an attachment will issue against him, to the end that he may be adjudged in contempt of the process of the court. It is not in the power of the court to look into the future and determine the kinds or quantities of freight that will be hereafter presented for transportation; and, by an order, specify how and in what manner the same shall be carried, or what kinds shall take preference."

The opinion sets forth the other facts with sufficient detail. [^{37, 39, 41-44}]

Leslie W. Russell, Attorney-General; E. C. James; Simon Sterne; Daniel G. Thompson, for appellants:

The order to show cause was but a short notice of motion, and the application for the writ should have been heard in the same manner as if made upon the

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usual notice, New York & Harlem R. R. Co. *v.* Mayor, etc., of New York, 1 *Hilt.* 562, 568 ; Thompson *v.* Erie R. R. Co., 9 *Abb.*, *N. S.*, 233, 238 ; Town of Middletown *v.* Rondout & O. R. R. Co., 12 *Id.* 276, 279. If the defendants desired to deny any of the allegations upon which the application was based, opposing affidavits should have been presented ; and the omission so to do, left the motion to be decided upon a question of law ; and the issue thus presented was, whether or not, upon the moving papers, the people were entitled to the writ. Upon this issue, the people were entitled to open and close.

Railroads are public highways, and a railroad company is a private corporation only in the sense that the ownership of its property is vested in private persons; the user of its property is public, and its franchises are held in trust for public use, *Laws* 1850, *Chap.* 140 ; Olcott *v.* Supervisors, 16 *Wall.* 678. It is because of this trust for public use that the right to exercise sovereign powers, such as eminent domain, to receive municipal aid through taxation, to maintain and operate a public highway and to receive tolls and fare, has been conferred, Bloodgood *v.* Mohawk & H. R. R. Co., 18 *Wend.* 9 ; Worcester *v.* Western R. R. Co., 4 *Metc.* 564 ; Olcott *v.* The Supervisors, *supra* ; Talcott *v.* Township of Pine Grove, 1 *Flipp.* 120 ; Township of Pine Grove *v.* Talcott, 19 *Wall.* 666 ; Messenger *v.* Pennsylvania R. R. Co., 36 *N. J.*, *Law*, 407 ; Matter of the Application of N. Y. Central & H. R. R. Co., 77 *N. Y.* 248.

The trust relation in which a railroad corporation stands to the public, extends to its duties as a common carrier for hire, *Laws* 1847, *Chap.* 270 ; Abbott *v.* Johnstown, etc., Horse R. R. Co., 80 *N. Y.* 31 ; McCoy *v.* Cincinnati, I., etc., R. R. Co., 13 *Fed. R.* 3 ; Messenger *v.* Pennsylvania R. R. Co., *supra* ; Chicago & North

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Western R. R. Co. *v.* People, 56 *Ill.* 365, 379; Vincent *v.* Chicago & A. R. R. Co., 49 *Id.* 33; McDuffee *v.* Portland & R. R. R. Co., 52 *N. H.* 430, 454, 455; New England Express Co. *v.* Maine Central R. R. Co., 57 *Me.* 196; Sanford *v.* Railroad Co., 24 *Pa. St.* 378, 381; Southern Express Co. *v.* St. Louis, etc., R. R. Co., 10 *Fed. R.* 210, 869; and see *Morawetz on Priv. Corp.*, §§ 496, 487, 406.

The general rule is, that a franchise or a right conferred for a public purpose must be exercised with a due regard to such purpose, *Lumbard v. Stearns*, 4 *Cush.* 60; *Spring Valley Water Works v. San Francisco*, 52 *Cal.* 111; *Weymouth v. Penobscot L. D. Co.*, 71 *Me.* 29, 38; *People ex rel. Kennedy v. Manhattan Gas-Light Co.*, 45 *Barb.* 136; *City of St. Louis v. St. Louis Gas-Light Co.*, 70 *Mo. 6.*, 117; *Dartmouth College v. Woodward*, 4 *Wheat.* 519, 556. Corporations which have assumed the performance of duties for the benefit of the public cannot neglect such duties without incurring a forfeiture of their charters. *State v. Pawtuxet Turnpike Co.*, 8 *R. I.* 182, 191; *People v. Fishkill Plank R. Co.*, 27 *Barb.* 445, 452; *People v. Hillsdale, etc., Turnpike Co.*, 23 *Wend.* 254; *People ex rel. Coon v. Plymouth Plank R. Co.*, 32 *Mich.* 248; *People v. Jackson & M. Plank Road Co.*, 9 *Id.* 285; *State v. Royalston Turnpike Co.*, 11 *Vt.* 431; *Turnpike Co. v. State*, 3 *Wall.* 210; *State ex rel. Attorney-General v. Milwaukee & L. S. R. R. Co.*, 45 *Wis.* 579. Especially is this the case, when the duties are imposed in express terms, *Attorney-General v. Petersburg & R. R. R. Co.*, 6 *Iredell L. (N. C.)* 456; *People v. Kingston & M. Turnpike Co.*, 23 *Wend.* 193, 208; *People ex rel. M'Kinch v. Bristol & R. Turnpike Co.*, *Id.* 222; *Charles River Bridge Co. v. Warren Bridge*, 7 *Pick.* 344, 371. But the people need not necessarily proceed for a forfeiture of the charter, they may compel a performance of the duty, *State*

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v. Hartford & N. H. R. R. Co., 29 Conn. 538; People *v.* Albany & V. R. R. Co., 24 N. Y. 261; Talcott *v.* Township of Pine Grove, 1 *Flipp.* 120, 144.

The remedies against railroad corporations for a neglect of corporate duty are mandamus, *quo warranto*, indictment, (People *v.* Albany & V. R. R. Co., 24 N. Y. 261), or injunction, McCoy *v.* Cincinnati, I., etc., R. R. Co, 13 *Fed. R.* 3. But mandamus is the peculiarly appropriate remedy to compel such corporations to perform their statutory duties (People *v.* Albany & V. R. R. Co., *supra*; Railroad Commrs. *v.* Portland & O. R. R. Co., 63 *Me.* 269; McCoy *v.* Cincinnati, I., etc., R. R. Co., *supra*; Talcott *v.* Township of Pine Grove, *supra*); and the writ has been issued to compel the performance of a great variety of acts (Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343; affirming Hall *v.* Union Pacific R. R. Co., 3 *Dill.* 515; United States *ex rel.* Hall *v.* Union Pacific R. R. Co., 4 *Id.* 479; State *v.* Hartford & N. H. R. R. Co., 29 Conn. 538; *Ex parte* Attorney-General *Re* New Brunswick & C. R. R. Co., 1 *P. & B.*, N. B., 667; Chicago & N. W. R. R. Co. *v.* People *ex rel.* Hempstead, 56 *Ill.* 365; Farmers' Loan & Trust Co. *v.* Henning, Receiver of L. L. & G. R. R. Co., 17 *Am. L. Reg.*, N. S., 266; People *ex rel.* Green *v.* Dutchess & C. R. R. Co., 58 N. Y. 152; N. Y. Central & H. R. R. Co. *v.* People, 12 Hun. 195; modified and affirmed, 74 N. Y. 302; State *ex rel.* Blake *v.* North Eastern R. R. Co., 9 *Rich., Law.* 274; People *ex rel.* Kimball *v.* Boston & A. R. R. Co., 70 N. Y. 569; Inhabitants of Cambridge *v.* Charlestown Branch R. R. Co., 7 *Metc.* 70; People *ex rel.* Garbutt *v.* Rochester, etc., R. R. Co., 14 *Hun.* 371, affirmed, 76 N. Y. 294; State *v.* New Haven & N. R. R. Co., 37 Conn. 153; King *v.* Severn & Wye R. R. Co., 2 *Barn & Ald.* 644), not only by railroads, but by other corporations, State *v.* Wilmington Bridge Co., 3 *Harrington*, 312; *Re*

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Trenton Water P. Co., 20 *N. J., Law*, 659 ; Regina *v.* Bristol Dock Co., 2 *Q. B.* 64 ; People *ex rel.* Kennedy *v.* Manhattan Gas-Light Co., 45 *Barb.* 136 ; City of St. Louis *v.* St. Louis Gas-Light Co., 70 *Mo.* 69, 117.

Corporations and ministerial officers are exceptions to the rule that a mandamus will not lie where the party aggrieved has a remedy by action for damages (Buck *v.* City of Lockport, 6 *Lans.* 251 ; People *ex rel.* Griffin *v.* Steele, 2 *Barb.* 397 ; McCullough *v.* Mayor, 23 *Wend.* 458), and where the remedy by action is not declared to be exclusive, the right to the writ is not defeated, People *v.* N. Y. Central & H. R. R. Co, 74 *N. Y.* 302 ; Candee *v.* Hayward, 37 *N. Y.* 653. To prevent the issuing of the writ, it must appear that there is another adequate remedy, *Wood on Mandamus*, 56, 111, 114, 115 ; 2 *Addison on Torts*, § 1486 (*Wood's Edition*). That private individuals may maintain actions for damages in nowise impairs the right of the State to move for the writ. It is the only adequate remedy by which the State can compel the operation of the road. The State is not bound to proceed for the forfeiture of the defendants' charter, it may demand the full and complete performance of the duties imposed by statute.

The attorney-general was the proper officer to institute this proceeding ; and he could move either *ex officio* or on the relation of a private person, 1 *R. S.* 179, § 1 ; *Code of Civ. Pro.* §§ 1991, 1993, 1994 ; *Tapping on Mandamus*, 54, 56, 228 ; *Moses on Mandamus*, 194-199 ; Ware *v.* Regents Canal Co., 3 *De Gex & Jones*, 212, 227; 1 *Broome & H. Com.* 214 ; People *ex rel.* Stephens *v.* Halsey, 37 *N. Y.* 344 ; People *ex rel.* Case *v.* Collins, 19 *Wend.* 56 ; *Pulling's Law of Atty's.* 22, 24 ; Commonwealth *v.* Woelper, 3 *Serg. & R.* 52 ; Commonwealth *ex rel.* Clements *v.* Arrison, 15 *Id.* 127 ; Queen *v.* Prosser, 11 *Bear.* 312 ; Attorney-General *v.* Magdalen College, 23 *L. J. Ch., N. S.*, 844 ; Union Pacific R. R. Co. *v.* Hall,

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91 U. S. 343 ; State *v.* Willmington Bridge Co., 3 *Harrington*, 312 ; State *v.* Hartford & N. H. R. R. Co., 29 *Conn.* 538 ; State *v.* New Haven & N. R. R. Co., 37 *Id.* 154 ; Davis *v.* Mayor, 14 *N. Y.* 506 ; Attorney-General *v.* Forbes, 2 *M. & C.* 123. The case of People *v.* Miner (2 *Lans.* 396), is distinguishable from the case at bar by the fact that there the threatened injury was a private one ; so, also, is the case of the People *v.* Albany & S. R. R. Co. (57 *N. Y.* 161), distinguishable, for the people now move in their own right. In People *ex rel.* Ohlen *v.* N. Y., Lake Erie & W. R. R. Co. (22 *Hun.* 533), there was no suspension of a franchise, the injury was confined wholly to a single person, for which he had an adequate remedy by action, and the application was not made by the attorney-general or at his instance. The case expressly concedes the right of the attorney-general to move when there has been a suspension of a franchise. In the case at bar, the refusal to carry freight for individuals is but the consequence of a quite general suspension of a franchise. The State now moves to compel the defendants to discharge their statutory duty by operating the roads for the public use, and, so far as the discharge of that duty involves the transportation of freight as a common carriers, it is an incident following the principal relief sought.

The discretion vested in railroad corporations by section 28 of Chap. 140 of the Laws of 1850, as amended by Chap. 133 of the Laws of 1880, to regulate the time and manner in which passengers and freight shall be transported, does not authorize a discontinuance of those duties, nor a decrease in the efficiency of the road, Railroad Comrs. *v.* Portland & Oxford Central R. R. Co., 63 *Me.* 269 ; People *ex rel.* Green *v.* Dutchess & C. R. R. Co., 58 *N. Y.* 152, 162. This application does not seek to interfere with the exercise of a discretion, but to compel the defendants to perform their well

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known duty. It would be sufficient for the writ to command the discharge of that duty without specifying the details.

Although the issuing of a writ of mandamus is generally discretionary, still if there is a clear right to that process, and no other adequate remedy exists, the court cannot refuse it, *People ex rel. Gas-Light Co. v. Common Council*, 78 N. Y. 56; *Code of Civ. Pro.*, § 1994.

Notwithstanding that the time wherein the writ would be efficacious may expire, the appeal should be heard. The appellate court must act upon the record as presented, and there is nothing therein contained, which shows that the writ would not be serviceable. The people should not be defeated in the attempt to procure that which was clearly their remedy, nor be deprived of compensation in costs, by the fact that they have been put to the necessity of appealing from an erroneous order, *Regina v. Mayor of Stamford*, 6 Q. B. 433, 441; *People ex rel. Vickerman v. Contracting Board*, 46 Barb. 254, 262; *People ex rel. Livingston v. Taylor*, 30 How. 78, 87; *State ex rel. Hixon v. Schofield*, 41 Mo. 38; *High on Ex. Leg. Rem.*, § 551. The case of *People ex rel. Geer v. Common Council of Troy* (82 N. Y. 575), is to be distinguished by the fact that there it appeared from the record that the time wherein the writ would be efficacious had passed. The duty of the defendant is a continuing one and the law makes a difference between the performance of such a duty and a mere specific act, *People ex rel. Case v. Collins*, 19 Wend. 56, 61; *Rogers Locomotive Works v. Erie R. R. Co.*, 20 N. J. Eq. 379, 386, 387; *Union Pacific R. R. Co. v. Hall*, 91 U. S. 343; *State v. Hartford & N. H.*, 29 Conn. 538; *Chicago & N. W. R. R. Co. v. People ex rel. Hempstead*, 56 Ill. 365; *People v. Albany & V. R. R. Co.*, 24 N. Y. 261; *Railroad Comrs. v. Portland & O. R. R. Co.*, 63 Me. 269. If the decision of the special term is allowed to stand,

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it will operate as a precedent to deprive the people of their only legal remedy in a time of some pressing necessity.

The relation of the freight-handlers' strike to this application is merely accidental. It is the duty of the defendants to perform their functions as carriers of freight, but with the difficulties which may be encountered in the discharge of that duty the State does not concern itself. If advantage is taken of the necessities arising from that duty, and the operation of the roads is made unprofitable, the defendants have their relief in a surrender of their corporate charters or by an increased charge for transportation. That the effect of the writ might, under existing circumstances, be to compel the defendants to accede to the demand of their skilled freight-handlers for an increase in the rate of wages, was a matter entirely extra judicial and with which the court at special term had no concern. It would be a mere incidental circumstance, of no consequence in reaching the proper conclusion, and affording no legal reason for denying to the people the use of the highway. If the performance of a public function can be suspended by a corporation, because of its being engaged in resisting what it deems to be an improper demand by its servants for an increase in the rate of wages, so it might suspend its functions in resisting what it deemed to be an improper increase in the price of coal, iron or any other commodity by it used. The exercise of reasonable foresight and care would have enabled the defendants to make themselves independent of any particular set of laborers ; but if they chose to rely upon their skilled freight-handlers, they should, in the interests of the public, have acceded to reasonable demands ; or, in event of a "strike," have employed a sufficient number of other laborers to regularly and properly discharge the corporate duty.

There was nothing illegal in the combination of the

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freight-handlers to obtain an advance in the rate of wages, nor in their refusal to work for seventeen cents per hour, *Laws of 1870, Chap. 19*; Master Stevedores' Association *v.* Walsh, 2 *Daly*, 1. Misconduct of the defendants' servants would not be an excuse for failure to perform the duty of a common carrier; if the misconduct of such servants amounted to a breach of contract, they would be liable to the defendants, Blackstock *v.* N. Y. & Erie R. R. Co., 20 *N. Y.* 48, affirming, 1 *Bosw.* 77.

That the State itself has no property requiring to be transported is no objection to the application. It is the duty of the State, through its chief law officer, to see that corporations charged with a public duty discharge such duty properly; and the fact that such an application as the present has never before been made, is accounted for by the fact that there has never been a similar neglect of duty on the part of any railroad corporation.

The court will take judicial notice of the great lines of public travel and the general course of trade and transportation throughout the country (*Smith v. N. Y. Central R. R. Co.*, 43 *Barb.* 225; *Maghee v. Camden & A. R. R. Co.*, 45 *N. Y.* 514), the history of railroad enterprises (*Matter of the Application of N. Y. Central & H. R. R. Co.*, 77 *N. Y.* 248, 266), of the general course of business in a community (*Merchants, etc., Bank v. Hall*, 83 *N. Y.* 338), and it cannot overlook the great public injury which is being inflicted by the defendants' neglect to discharge their duty in an efficient manner.

Roscoe Conkling, Wm. D. Shipman (Frank Loomis, attorney), for respondents:

This is not a case in which the people of the State are so interested that the attorney-general can proceed as plaintiff, *People v. Miner*, 2 *Lans.* 396; *People v.*

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Albany & Susquehanna R. R. Co., 57 *N. Y.* 161. The general duties of the attorney-general are prescribed by 1 *R. S.* 179, §§ 1-17; *Id.* 185, §§ 1-3, 6-11, 14, which do not authorize such a proceeding as the present. His only powers in respect to private corporations, generally, are conferred by Article 4, Title 2, Chapter 15, of the Code of Civil Procedure. But the Code provisions relate to formal actions, and it is expressly prescribed (§ 1800) that such actions shall be triable by a jury. Mandamus is a State writ, and may, under section 1993, be awarded on the application of the attorney-general, in an action or special proceeding where the people are a party, or where they are interested; but this section has no relation to the present application, for it refers to the issuing of the writ in furtherance of pending actions or special proceedings, and not by way of initiating new suits, and it refers only to actions or special proceeding in which the people are rightfully and solely the party. Mandamus is a civil proceeding, and the powers of the attorney-general are no greater in applying for the writ than in any other civil proceeding, *High on Ex. Leg. Rem.* §§ 8, 430, and cases cited.

It is universally held, that any inexcusable neglect or refusal of a common carrier to transport and deliver freight according to the law governing its duties, is a private wrong to the particular shipper or consignee interested, and redressible by an action; and it is not a public wrong laying the foundation for an action by the State. The people of the State have no legal interest in such a matter, and cannot enforce private rights, nor redress private wrongs, People *ex rel.* Ohlen *v.* N. Y., Lake Erie, etc., R. R. Co., 22 *Hun*, 533. In the cases of People *v.* The Mayor (9 *Abb.* 253), and People *v.* The Mayor (10 *Id.* 144), where the intervention of the attorney-general was sustained, the corporations were municipal and therefore public. No aid in support of

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the authority of the attorney-general can be derived from the mere fact that the defendants are corporations. They are private and not public corporations, 2 *Kent's Com.* *275.

If the defendants have failed to comply with the statutory requirement, as claimed, mandamus is not the proper remedy; the attorney-general should proceed by action under the Code, to annul the charters, and such an actions would be triable by a jury.

The attorney-general is not charged with the duty of superintending the transportation and delivery of freight by common carriers, nor is he armed with the power to invoke the writ of mandamus requiring a particular carrier to transport goods at a particular time. This is the first time in the history of litigation that any such proceeding as the present has been instituted, and no application was ever before made for a writ with such commands as are here prayed for.

Even if it be conceded that the attorney-general has the right to apply for the writ, he has not made a case upon which the court can act. Section 2070, upon which the application for a peremptory writ must rest, provides for the issuing of the writ when the right thereto "depends only upon questions of law." Whether a carrier is bound to transport particular goods at a particular time, or forthwith, is, *ex necessitate*, a question of fact, or, at the least, a mixed question of law and fact. It depends upon the character of the goods offered, their condition, order of precedence in which they are to be carried, in view of the accumulation of freight, and the equipment and capacity of the carrier. The writ must be specific, addressed to a particular person and commanding the performance of a particular act which the law directs to be done, and all the facts necessary to enable the court to act legally and intelligibly must be presented. The present application is deficient

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in this respect. The papers upon which it is made do not set forth the particular wrong to be remedied, so that the writ may command the performance of a particular act, and the application should therefore be dismissed, *Commercial Bank of Albany v. Canal Commrs.*, etc., 10 *Wend.*, 25; *People ex rel. Lorillard v. Supervisors of Westchester*, 15 *Barb.* 607; *People ex rel. Smith v. Judges of Columbia Common Pleas*, 3 *How.* 30; *Hawkins v. More*, 3 *Ark.* 345; *Canal Trustees v. People*, etc., 12 *Id.* 248, 254; *High on Ex. Leg. Rem.*, § 537, and cases cited. It is only the specific wrong set forth in the application that can be remedied by the writ, *People ex rel. Post v. Ransom*, 2 *N. Y.* 490; *People ex rel. Lorillard v. Supervisors of Westchester*, *supra*. It is clear from the moving papers that no specific right is sought to be enforced, and the application is too broad.

The writ will only issue to compel the performance of some act which the defendant has refused to do; it will not be granted in anticipation of a threatened omission of duty, *High on Ex. Leg. Rem.*, § 12. It appears from the moving papers that the defendants are performing their duty; although, through a conspiracy of their servants, the full and perfect discharge of that duty is impeded. There has been no suspension of a franchise, there is a mere temporary delay which the defendants are using their best endeavors to overcome, by the employment of other servants, who are daily becoming more skilled in handling the freight.

As there is an adequate and sufficient remedy at law, the writ should not issue, *People ex rel. Ohlen v. N. Y., Lake Erie, etc., R. R. Co.*, 22 *Hun*, 533; *People ex rel. Mygatt v. Supervisors of Chenango Co.*, 11 *N. Y.* 563.

An application for the writ is always addressed to the discretion of the court, *People ex rel. Mott v. Board of*

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Supervisors, 64 *N. Y.* 600, 604; People *ex rel.* Perkins *v.* Hawkins, 46 *Id.* 9; People *ex rel.* Hackley *v.* Croton Aqueduct Board, 49 *Barb.* 259, 264; *Ex parte* Ostrander, 1 *Den.* 679; Judges of Oneida Com. P., *v.* People *ex rel.* Savage, 18 *Wend.* 79, 98; People *ex rel.* McClelland *v.* Dowling, 37 *How.* 394, S. C., 55 *Barb.* 197; People *ex rel.* Duff *v.* Booth, 49 *Barb.* 31, People *ex rel.* Slavin *v.* Wendell, 71 *N. Y.* 171. The question of discretion was a proper one to be considered upon the motion to quash, for if the case made by the attorney-general did not warrant the exercise of discretion, the application was properly dismissed.

On the face of the moving papers, the application is a scheme to compel the defendants to submit to the demands of the " strikers," and the power of the court would be invoked to that end. It is not shown explicitly that the wages paid by the defendants were not reasonable. The defendants have the right to employ their servants at such reasonable compensation as may be agreed upon, according to the usual course of business in every community ; and they should not be compelled by judicial pressure to employ a certain class of laborers at a rate of compensation arbitrarily dictated by such laborers. It is impossible for the defendants to keep two sets of skilled workmen, one lying idle and to be used only in case the other should combine and suddenly quit work. It is not discreet or practicable for the court to undertake to regulate the employment of laborers by carriers ; and, even if the court has the power so to do, it would not be a wise or just exercise of judicial discretion to coerce the defendants into compliance with the demands of the " strikers," under the facts of this application.

By the Court.—DAVIS, P. J.—The appellants, upon the petition of the attorney-general, and affidavits

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accompanying the same, obtained orders from one of the justices of this court requiring the respondents, respectively, to show cause, upon service of less than eight days, at a special term sitting at chambers, why a peremptory writ of mandamus should not issue commanding the respondents, respectively, to forthwith resume the discharge of their duties as common carriers, and the exercise of their franchises, by promptly receiving, transporting and delivering all such freight or other property as may be offered to, or heretofore received by them, for transportation at their stations in, and to, the city of New York, upon the usual and reasonable terms of charge.

Upon an adjourned day for the hearing of the motion, the respondents appeared by counsel and objected that the moving papers failed to show any grounds for the relief prayed for, and moved to "quash and dismiss said petitions and orders to show cause." The court entertained this motion; and, against the objection of the appellants, awarded the right to open and close the argument on the hearing to the counsel for the respondents; and, after hearing the respective counsel, the court orders as follows: "That the said preliminary objection be, and the same is hereby, sustained; and the application of the said petitioner be, and the same is hereby, in all things, denied; and the motion to quash and dismiss the said petition and order to show cause is hereby granted."

It is now objected that this mode of disposing of the motions was so far irregular as to render the order erroneous. It certainly was an unusual mode of [1] proceeding. The motions came to the special term precisely as though upon an ordinary notice. The order of the judge simply limited the time of notice, and when the respondents appeared in answer to [2] the notice, if they were willing to come to a hear-

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ing upon the petition and affidavits, the usual and proper course was to proceed to a hearing of the motions upon those papers, the moving party holding the affirmative, and being entitled to the right to open and close. A motion to quash a motion is a novel proceeding. Motions to quash usually apply to existing writs or process, and not to mere attempts to obtain them. The court doubtless regarded the action of the respondents' counsel as in the nature of a demurrer *ore tenus* to the petition and affidavits on the part of the appellants. Where an *alternative writ* has been granted, the defendant may move to quash or set the same aside (People *ex rel.* Knapp *v.* Judges, etc., of the county of Westchester, 4 *Cow.* 73). And such a motion is in the nature of a demurrer (People *ex rel.* Barnet *v.* College of Physicians, 7 *How. Pr.* 290), and should be made before the return to the writ, unless the motion to quash is based upon a defect in substance, in which case it may be taken advantage of any time before a peremptory mandamus is awarded (Commercial Bank of Albany *v.* Canal Commissioners, etc., 10 *Wend.* 25; The People *ex rel.* Post *v.* Ransom, 2 *N. Y.* 490). Of course, upon such a motion, the moving party holds the affirmative. But that was not this case. In this case, no alternative writ having been issued, there was nothing to quash, and the objection was simply an assertion that the appellants were not, upon their own showing, entitled to have the motion granted, and such assertion did not change the rights of the respective parties as to the order of proceeding on the hearing. The court of appeals have held, that the according of the affirmative to the wrong party, on a trial before a jury, is an error fatal to the judgment.* But on motions at

* See Millard *v.* Thorn, 56 *N. Y.* 402.

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special term, it is not very material which party opens or closes ; and this court, on review, will only inquire into the correctness of the decision, where the order denies or grants the motion. In this case, although the order directs that the petition and proceedings be quashed, yet the motion for the mandamus was also denied, and both the denial and the order to quash were based upon the merits of the motion. The right of appeal was not affected, and we think it is our duty to hear and dispose of the appeal upon the [¶] merits. The practice at the special term should, however, be discountenanced as a precedent.

The question presented by the motion is one of signal importance. It is, whether the people of the State can invoke the power of the courts to compel the exercise by railroad corporations of the most useful public [¶] functions with which they are clothed. If the people have that right, there can be no doubt that their attorney-general is the proper officer to set it in effective operation on their behalf (1 R. S. 179, § 1; *Code of Civil Procedure*, § 1993; People *ex rel.* Stephens *v.* Halsey, 37 N. Y. 344; People *ex rel.* Case *v.* Collins, 19 Wend. 56). The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred, and the duties imposed upon them by the [¶] laws of their creation and of the State. As bodies corporate, their ownership may be, and usually is, altogether private, belonging wholly to the holders of their capital stock, and their management may be vested in such officers or agents as the stockholders and directors, under the provisions of law, may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantage of the corporators. But these conditions are in no just sense in conflict with their obligations and

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duties to the public. The objects of their creation are, from their very nature, largely different from those ["] of ordinary private and trading corporations. Railroads are in every essential quality public highways, created for public use, but permitted to be owned, controlled and managed by private persons. But for this quality, the railroads of the respondents could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain, which belongs to the State in its corporate capacity alone, and cannot be conferred except upon a "*public use*."

["] The State has no power to grant the right of eminent domain to any corporation or person for other than a public use. Every attempt to go beyond that is void by the Constitution ; and, although the legislature may determine what is a necessary public use, it cannot, by any sort of enactment, divest of that character any portion of the right of eminent domain, which it may confer. This characteristic of "*public use*" is in no sense lost or diminished by the fact that the use of the railroad by the corporation which constructs or owns it must from its nature be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public.

["] The general and popular use of a railroad as a highway is, therefore, handed over exclusively to corporate management and control, because that is for the best and manifest advantage of the public.

["] The progress of science and skill has shown, that highways may be created for public use, of such form and kind that the best and most advantageous enjoyment by the public can only be secured through the ownership, management and control of corporate bodies created for that purpose ; and the people of the State are not restricted from availing themselves of the best modes for the carriage of their persons and

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[¹⁵] property. There is nothing in the Constitution hostile to the adoption and use by the State of any and every newly developed form or kind of travel and traffic, which have a public use for their end and aim, and giving to them vital activity by the use of the power of eminent domain.

When the earliest Constitution of our State was adopted, railroads were unknown. The public highways of the State were its turnpikes, ordinary roads,

and navigable waters. The exercise of eminent [¹⁶] domain in respect to them was permitted by the

Constitution, for the same reasons that adapt it now to the greatly improved methods of travel and transportation ; and, in making this adaptation, there is no enlarged sense given to the language of the Constitution, so long as its inherent purpose — the creation only of public uses -- be faithfully observed.

These principles are abundantly sustained by authority. In *Bloodgood v. The Mohawk & Hudson R. R. Co.* (18 *Wend.* 9), the court of last resort in this State first announced them, and affixed to railroads their true character as public highways. It is there declared, that the fact that railroad corporations may remunerate themselves by tolls and fares "does not destroy the public nature of a road, nor convert it from a public to a private use. * * * If it is a public franchise, and granted to the company for the purpose of providing a mode of public conveyance, the company, in accepting it, engages on its part to use it in such manner as will accomplish the object for which the legislature designed it." And in *Olcott v. The Supervisors* (16 *Wall.* 678), the supreme court of the United States adjudged: "That railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and trans-

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[¹⁷] portation have had any existence. Very early the question arose whether a State's rights of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a State legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is, that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. * * * Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it, or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. *No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public.* * * * The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

[¹⁸] All public highways are subjects of general State jurisdiction, because their uses are the com-

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mon property of the public. This principle of the common law is, in this State, of universal application. As to the class of public highways known as railroads, the common law is fortified by the express conditions of the statutes creating, regulating or controlling them.

[¹⁹] The general railroad act of this State may now be regarded as the general charter of all such corporations. It authorizes the organization of corporations for "the constructing, maintaining and operating" of railroads "for public use," and it imposes upon them the duty to "furnish sufficient accommodations for the transportation of all * * passengers and property, * * and to transport * * such passengers and property * * on the due payment of the freight or fare legally authorized therefor." (Laws of 1850, Chap. 140, §§ 1, 36).

These words are a brief summary in respect to the duties imposed upon such corporations by all the provisions of the act. Those duties are consigned to them as public trusts; and, as was said in *Messenger v. Pennsylvania R. R. Co.* (36 N. J., Law, 407), "although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the public good." This relation of such a corporation to the State is forcibly expressed by EMMONS, J., in *Talcott v. Township of Pine Grove* (1 *Flippin U. S. Circuit Court R.* 120, 144): "The road once constructed is, instanter, and by mere force of the grant and the law, embodied in the governmental agencies of the State, and dedicated to public use. All and singular its cars, engines, rights of way and property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office. The artificial personage—the corporation created by

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the sovereign power expressly for this sole purpose and no other—is, in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice."

[²⁰] The acceptance of such trusts on the part of a corporation by the express and implied contracts already referred to, makes it an agency of the State to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of public highways are so devolved, and the performance of every official duty in respect to them may be compelled by the courts, on application of the State, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations, in regard to their relations to the State, is strong and clear; and, so far as affects the construction and proper and efficient maintenance of their railways, will be questioned by no one. It is equally clear, we think, in regard to their duty as carriers of persons and property. This

springs sharply out of the exclusive nature of their [²¹] right to do these things. On other public highways, every person may be his own carrier, or he may hire whomsoever he will to do that service. Between him and such employee, a special and personal relation exists independent of any public duty, and in which the State has no interest. In such a case, the carrier has not contracted with the State to assume the duty *as a public trust*, nor taken the right and power to do it from the State by becoming the special donee and depository of a trust. A good reason may, therefore, be assigned why the State will not, by mandamus, enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public high-

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way is the exclusive property of a body corporate which alone has power to use it, in a manner which, of necessity, requires that all management, control and user, for the purposes of carriage, must be limited to itself, and which, as a condition of the franchise that grants such absolute and exclusive power over, and user of, a public highway, has contracted with the State to accept the duty of carrying all persons and property, within the scope of its charter, as a public trust. The relation of the State to such a body is entirely different from that which it bears to the individual users of a common highway, as between whom and the State no relation of trust exists, and there is small reason for seeking analogies between them.

[²²] It is the duty of the State to make and maintain public highways. That duty it performs by a scheme of laws which sets in operation the functions of its political divisions into counties, towns and other municipalities, and their officers. It can and does enforce those duties, whenever necessary, through its courts. It is not the duty of the State to be or become a common carrier upon its public highways ; but it may, in some cases, assume that duty ; and whenever it lawfully does so, the execution of the duty may be enforced against the agents or officers upon whom the law [²³] devolves it. It may grant its power to construct a public highway to a corporation or an individual ; and, with that power, its right of eminent domain, in order to secure the public use, and may make the traffic of the highway common to all on such terms as it [²⁴] may impose. In such case, it is its duty to secure that common traffic, when refused, by the authority of its courts (People *ex rel.* Case *v.* Commissioners of Smyrna, 19 Wend. 56 ; People *ex rel.* McFarland *v.* Commissioners of Salem, 1 Cow. 23). Or it may grant the same powers of construction and maintenance with

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the exclusive enjoyment of use, which the manner of use requires ; and, if that excludes all common travel and transportation, it may impose on the corporation or person the duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as public needs may require. Why is that duty in respect to the power to compel its performance through the courts, not in the category of all others intrusted to such a body ?

[²³] The writ of mandamus has been awarded to compel a company to operate its railroad as one continuous line (*Union Pacific R. R. Co. v. Hall*, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (*State v. Hartford & N. H. R. R. Co.*, 29 Conn. 538); to compel it to construct and maintain fences and cattle guards (*People ex rel. Garbnitt v. Rochester & State Line R. R. Co.*, 14 Hun, 371; affirmed, 76 N. Y. 294); to compel it to build a bridge (*People ex rel. Kimball v. Boston & Albany R. R. Co.*, 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (*State ex rel. Blake v. Railroad Co.*, 9 Richardson, 247); to compel the company to run daily trains (*Re New Brunswick & Canada R. R. Co.*, 1 P. & B., *New Brunswick*, 667); to compel the delivery of grain at a particular elevator (*Chicago & N.W. R. R. Co. v. People ex rel. Hempstead*, 56 Ill. 365); to compel the completion of its road (*Farmers' Loan & Trust Co. v. Henning, Receiver of L. L. G. R. R. Co.*, 17 Am. Law Reg. 266); to compel the grading of its track so as to make crossings convenient and useful (*People ex rel. Green v. Dutchess & C. R. R. Co.*, 58 N. Y. 152; *N. Y. Central & H. R. R. Co. v. People*, 12 Hun, 195, affirmed 74 N. Y. 302; *Indianapolis R. R. Co. v. The State*, 37 Ind. 489; *State ex rel. Nicholson Pavement Co. v. Ricord, Mayor*, 35 N. J., *Law*, 896); to compel

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the re-establishment of an abandoned station (*State v. New Haven & N. R. R. Co.*, 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (*King v. Severn & W. R. R. Co.*, 2 *Barn. & Ald.* 644); to prevent the abandonment of a road once completed (*Talcott v. Township of Pine Grove*, 1 *Flippin*, 145); and to compel a company to exercise its franchise (*People v. Albany & V. R. R. Co.*, 24 N. Y. 261). These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers.^[26] That duty is indeed the *ultima ratio* of their existence — the great and sole public good — for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert, that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to compel the doing of the thing itself.

[27] We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers, and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit ; and, also, upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise (*Abbott v. Johnstown, &c., Horse R. R. Co.*, 80 N. Y. 27, 31); and, also, upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed, in the special instance, by the legislature, for adequate reasons, into a corporate franchise, to be exercised solely by a corporate body for the

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public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see [²⁹] to it, that the franchise so put in trust be faithfully administered by its trustee.

But it is said that the State is not injured and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust, for the people, the official duties reposed in their hands; but that is no test of the power or duty of the State, [³⁰] in either case. The sovereignty of the State is injured, whenever any public function vested by it in any person, natural or artificial, for the public good, is not used, or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State; and, thereby, in a legal sense, injures the entire body politic.

[³¹] The State in such a case as this has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations have neglected public duties (People *v.* Fishkill, &c., Plank Road Co., *27 Barb.* 445, 452, 458; People *v.* President, &c., of the H. & C. Turnpike Co., *23 Wend.* 254; Turnpike Co. *v.* State, *3 Wall.* 210; People *ex rel.* Bishop *v.* Kingston & N. Turnpike Co., *23 Wend.* 193, 208; People *ex rel.* M'Kinch *v.* Directors, &c., of Bristol & R. Turnpike Co., *Id.* 222; Charles River Bridge *v.* Warren Bridge, *7 Pick.* 344); but that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue (State *v.* Hartford & New Haven R. R. Co., *29 Conn.* 538; People *v.*

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Albany & V. R. R. Co., 24 N. Y. 261; Talcott *v.* Township of Pine Grove, *supra*).

[²³] Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt.

[²⁴] Nor do we think the fact that injured individuals may have private remedies for the damages they may have sustained by neglect of duties, preclude [²⁵] the State from its remedy by mandamus. Where

the injury is to a single person, under circumstances which do not affect the general public, the courts, in the exercise of their discretion, have properly refused this remedy on his relation. The injured party is then the suitor. He has an adequate remedy by private action for damages. That was the case of People *ex rel.* Ohlen *v.* N. Y., Lake Erie & Western R. R. Co. (22 Hun, 533), relied upon by the court below, in which this court held, that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the attorney-general, for a neglect or refusal by corporations to exercise their franchise to an extent which affects great numbers of citizens and continues to, for a considerable period of time; nor does it deny the right of the people, acting on their own behalf and in their own suit, to pursue this remedy in any case of neglect or refusal to exercise a public function which the interests of the people require should be kept in vigorous and efficient use. The court in that case recognizes the distinction when it says: "An exception exists * * * where a corporation suspends the

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exercise of its franchises." The suspension of the exercise of corporate franchises is the gravamen of the complaint in this case, and the case cited is no authority for denying the writ when the people come into court with their own suit, by their attorney-general, to move for a writ of mandamus, on allegations of an alleged long-continued and very general suspension of a corporate duty.

[*] It was supposed by the court below that the provisions of section 28 of the act of 1850, as amended by Chap. 133 of the Laws of 1880, which provide that railroad corporations shall have power, "To regulate the time and manner in which passengers and property shall be transported," interfere in some way with the power to grant the writ. Undoubtedly it gives the discretion which the learned judge states, but it cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. Language of that kind in a similar act was correctly construed by DICKERSON, J., in Railroad Commissioners v. Portland & Oxford Central R. R. Co. (63 Maine, 269). We adopt, but have not room to quote, his language.*

Having determined the question of the right of the

*The language of DICKERSON, J., in this particular is: "The charter of the Portland and Oxford Central Railroad Company, § 1, provides that 'said corporation * * * shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles for the transportation of persons and articles, and be obliged to receive, at all proper times and places, and convey the same when the appropriate tolls therefor shall be paid and tendered.' * * * By § 6, the president and directors, under direction of the stockholders, have authority to exercise all the powers granted to the corporation for locating, building, and completing and running the road, and all such power as may be necessary and proper to carry into effect the objects of the grant.

"The duty of the corporation in respect to the subject under consideration is enjoined in that provision of the charter which requires it 'to receive at all proper times and places, and convey persons and articles.' It is contended on behalf of the corporation, that the power to determine

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State to prosecute the writ of mandamus, on the ground of refusal or neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ was ["] presented. The case stands altogether upon the facts presented by the appellants. The course taken by the respondents must be regarded as an admission of the material facts contained in the petition and affidavits.

["] The petition alleges: "That the said railroad company, since about the 16th day of June, 1882, has substantially refused to discharge its duties as a common carrier, and has, to a material degree, suspended the exercise of its franchises by refusing to take freight which has been offered at its stations in the city of New York, for transportation at the usual rates and upon the usual terms; and that said railroad company has refused to accept and transport the greater part of the outgoing, and to deliver the incoming, freight and property of the merchants doing business in the city of New York, who have relations with, and need for the services of, such railway, and has refused to them to furnish adequate

what are 'proper' times and places for the purposes stated is discretionary with the directors, and that their decision is conclusive and final; and, on the part of the State, it is claimed that the duty thus enjoined upon the corporation is imperative and absolute, and that the State has the power, through its appropriate tribunals, to determine whether it has been performed, and to enforce a performance, if there has been none, or only a partial one.

" In determining this question, it should be remembered that the object of the grant was to secure the construction of a public highway. * * *

" The duties enjoined upon the corporation are ministerial duties, to do and perform what the public convenience and necessity reasonably require, in respect to the particulars specified. Nor is it within the discretion of the directors to determine ultimately what these public ministerial duties are, or the manner in which they are to be performed; to hold so would be to concede to the directors the power to promote the private interests of the corporation, by subverting the public objects

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transportation for the same, so that from the date aforesaid until the present date, the business community of the city of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation ; but said railroad has uniformly delayed, and sometimes peremptorily refused to receive and deliver freight, and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damage accrue to the people of the State of New York, for which there is no adequate remedy in damages ;" and, "that the trade and commerce of said city are greatly injured by the action of the said railroad."

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations ; but it is not important [**] to examine them minutely, because the admission

to be subserved by the charter; the power, both of determination and enforcement, are necessarily vested in State authority. * * *

"The construction of the charter set up in defense is obviously against public policy. * * *

"To make railroad directors the sole and ultimate judges of 'the times and places' when and where the corporation will 'receive and convey persons and articles' on the line of its road, would be to give railroad corporations the power to control the markets of the country, to create a surplus, or a famine, in agricultural, mineral and other products; to raise or reduce the wages of labor; and to promote, or retard, at pleasure, the growth, prosperity and welfare of towns, cities and country. A construction that leads to such results is inconsistent with the nature of the grant to the defendant corporation, contrary to its spirit, and subversive of the public objects it was intended to promote. The legislature will not be held to be so indifferent to the trust committed to it, as to divest itself and the State tribunals of authority over the manner in which the franchises granted by it are to be exercised in the important particulars under consideration, unless its intention to do so is expressed in specific terms."

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of a demurrer *ore tenus* extends to, and admits, ["] the well pleaded averments of the petition. Stated very briefly, the affidavits show that for about two weeks the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city ; and, in many instances, refused to receive goods offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight ; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner ; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shippers to pay charges, but was wholly the act of respondents ; that it was so continued and extensive that it seriously interfered with the business operations of the citizens of New York, deteriorated the value of many commodities and caused a diversion of trade from the city ; that great losses were caused, and especially that large quantities of perishable goods, by reason of non-delivery, were destroyed, to the value of many thousand dollars ; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage ; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than \$50,000, while the aggregate of injuries is estimated at some millions. These are the substantial facts conceded by respondents at the special term.

["] Surely it cannot be doubted, that these facts, being true and unexcused, showed a strong case for the interference of the State.

The only question is, whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the court

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was justified in denying the motion for the writ on its own merits, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons assigned by the respondents for their refusal to accept, transport and deliver the freight and property. In the petition it is stated in these words :

"That the persons in their employ, handling such freight, refuse to perform their work, unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight-handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour (or two dollars per day of ten hours) were paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterward employed, caused the neglect and refusal complained of.

[4] It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appears. It is urged, in effect, that the court should regard the cases as one of unlawful duress caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statement of the case, a body of laborers acting in concert fixed a price for their labor, and refused to work at a less price. The respondents fixed a price for the same labor, and refused to pay more. In doing this, neither did an act violative of any law or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect to the price to be paid and adhere to it, if they chose ; but, if the consequence of their doing so were an inability to exercise their corporate franchises to the great

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injury of the public, they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

[“] If it had been shown that a “strike” of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought, through them, to enforce its will upon the respondents, and that the respondents in resisting such unlawful efforts had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. Whether such a state of facts could have been shown, we cannot judicially know. The present case must stand or fall upon the papers before us, and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case, which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is, that the skilled freight-handlers of the respondents refused to work without an increase of wages, to the amount of three cents per hour ; that the respondents refused to pay such increase ; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work. And so, the numerous evils complained of fell upon the public, and were continuous, until the people felt called upon to step in and seek to remedy them by proceedings for mandamus.

[“] These facts reduce the question to this : Can railroad corporations refuse or neglect to perform their

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public duties, upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed *without any process recognized by law*. This is something no public officer charged with the same trusts and duties in regard to other public highways can do, without subjecting himself to mandamus or indictment.

[⁵] We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation. That is, to receive, carry and deliver the same, under the existing rules and regulations as the business had been [⁶] accustomed to be done. There was no necessity to specify what kinds of goods should be first received and carried, or whose goods; or, indeed, to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ, on their own behalf, and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ, all questions, whether what has been done is a sufficient compliance with its command, may properly arise and become a subject of further consideration (People *ex rel.* Green *v.* Dutchess & Columbia R. R. Co., 58 N. Y. 152, 160, 161). They need not have been anticipated.

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[⁴⁷] It is suggested that the time has now passed when such a writ can be of any valuable effect. That is probably so, but we are governed by the record in disposing of the appeal, and not by subsequently occurring events. The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous, they are entitled to have that judgment reversed, and to be indemnified, in the discretion of the court, for the costs incurred on the appeal made necessary by the error.

We think the court below had power to award the writ, and that, upon the case presented, it was error to refuse it.

The order should be reversed, with the usual costs, and an order entered, if deemed advisable from any existing circumstances, by the attorney-general, awarding the writ.

DANIELS and BRADY, JJ., concurred.

FEIG, ADMINISTRATOR, v. WRAY.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
JANUARY, 1883.

§ 3246.

Costs against administrator personally. — When cause of action vests in him, in private right, and suit is brought in representative capacity, costs chargeable against him personally. — Judgment for such costs may be entered without order of court, although no finding of mismanagement or bad faith.

Where a cause of action vests in an administrator in his private right, and he brings an action thereon in his representative capacity, and the defendant recovers judgment dismissing the complaint with costs, the

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costs of the action are chargeable against such administrator personally, although there is no finding of mismanagement or bad faith in the prosecution of the action ; and judgment for costs may be entered without an order of the court directing such costs to be paid by the administrator personally.

Motion by defendant to amend the postea in the action.

The facts are sufficiently stated below.

J. H. Goodman, for motion :

Urged that the referee not having found that there was mismanagement or bad faith on the part of the plaintiff, in the prosecution of the action, the costs were not chargeable against the plaintiff personally, and the defendant could not enter a judgment dismissing the complaint with costs, so as to charge the defendant, without a direction from the court to the effect that costs were payable by the plaintiff personally. *Code of Civ. Pro.*, § 3246 ; *Woodruff v. Cook*, 14 *How.* 481 ; *Lindsay v. Deafendorf*, 43 *Id.* 90 ; *Slocum v. Barey*, 38 *N. Y.* 46 ; *Dodge v. Crandall*, 30 *N. Y.* 294 ; 3 *Wait's Pr.* 531.

Koones & Goldman, opposed.

LAWRENCE, J.—This action was brought by the plaintiff as administrator of the goods and credits of William A. Briesle, deceased, to recover the value of certain goods which were alleged in the complaint to have belonged to the deceased. The complaint avers that the intestate died on the 4th of September, 1879, and that on the 24th of September, 1879, the plaintiff was appointed the administrator of the estate, and that he duly qualified and entered upon the discharge of his duties as such administrator. It is then alleged that the intestate was the owner, at the time of his death, of the goods, to recover the value of which this action is brought,

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and that subsequent to his death, and prior to the appointment of the plaintiff as administrator, the defendant unlawfully took possession of the same, and converted them to his own use. It is also alleged, that prior to the commencement of this action after his appointment, the plaintiff, as such administrator, demanded the possession of such goods, etc., from the defendant, who refused to deliver up the same. The cause was referred to Mr. Abbott, as referee, who found in favor of the defendant, and that he was entitled to judgment, with costs. Subsequently judgment was entered dismissing the complaint, with costs. The postea is entitled Isaac Feig v. Thomas Wray, there being no description of the plaintiff as an administrator in the title. This motion is made to amend the postea "by adding to the name of the plaintiff in the title thereof the words, as administrator of the goods, chattels and credits of William A. Briesle, deceased," the object being, of course, to exempt the plaintiff from the payment of costs individually.

The plaintiff's counsel relies upon section 3246 of the Code of Civil Procedure, in support of his motion, and of the proposition, that it not having been found by the referee that his client has been guilty of bad faith in the prosecution of the action, costs under that section cannot be imposed upon him personally. To this it is replied, on the part of the defendant, that section 3246 of the Code of Civil Procedure is the same as section 317 of the old Code, and that under the old Code it was frequently held that, in a case of this nature, the unsuccessful plaintiff, executor or administrator, was liable for costs personally, and that, too, without an express order of the court to that effect. It will be observed by a reference to the complaint, that the alleged wrongful taking of the goods occurred *after the death of Briesle*, and that the conversion became complete when,

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on a subsequent demand by the plaintiff as administrator, the defendant refused to deliver possession of the goods. In *Holdridge v. Scott* (1 *Lans.* 303), it was held that where the record shows that the cause of action, if any, arose *after the death* of the testator or intestate, such right of action vests in the executor or administrator *in his private right*, and that he cannot, in such case, escape the penalty of costs, by suing in form in his representative capacity, unnecessarily, if he fails to obtain judgment. That case arose under section 317 of the Code of Procedure, and Justice LAMONT, in delivering the opinion of the court, which was concurred in by Justices DANIELS and MARVIN, reviews all the cases, and reaches the result above stated. To the same effect is the case of *Fox v. Fox* (5 *Hun*, 53, 54), decided by the general term of the fourth department, opinion per GILBERT, J. The doubt which I entertained on the argument of this motion was chiefly as to the right of the defendant to enter judgment against the plaintiff in this case, without an order of the court permitting him to do so. An examination of the authorities conclusively shows that he has such right. (See *Bostwick v. Brown*, 15 *Hun*, 308; *Holdridge v. Scott*, 1 *Lans.* 303; *Lyon v. Marshall*, 11 *Barb.* 241, and cases cited per EDWARDS, J., at p. 248; *Smith v. Petten*, 9 *Abb.*, N. S., 205.)

This motion will, therefore, be denied, with costs.

Dougliss v. Atwell.

DOUGLISS ET AL. v. ATWELL ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM; OCTOBER, 1882.

§ 3256.

Disbursements.—When cost of lithographic copies of summons, complaint and telegraphic despatches will be allowed as.

In an action for partition, where there are numerous defendants, and upon an uncontradicted affidavit showing a reasonable necessity for incurring the expense of lithographic copies of the summons, complaint and supplemental complaint, the cost of such copies will be allowed as a disbursement in the action; and so, also, will the cost of telegraphic despatches sent without the State for the purpose of securing documentary evidence, when communication by mail would not be sufficiently rapid.

Motion by plaintiffs for a new taxation of costs.

The action was for partition, and there were twenty-seven defendants.

The plaintiffs recovered judgment, and at the taxation before the clerk, they presented an affidavit, which was not contradicted, showing the expenditure of thirty-eight dollars and eighty-four cents for lithographic copies of the summons and complaint, four dollars and sixty-five cents for lithographic copies of the supplemental complaint, and two dollars and thirty cents for telegraphic despatches sent without the State for the purpose of procuring documentary evidence to be used on the trial, when communication by mail would not have been sufficiently rapid to secure the documents in time.

The clerk refused to allow these items, and the plaintiffs moved for a new taxation before the court.

Van Schaick, Gillender & Stoiber, for plaintiffs:

Referred to the concluding clause of section 3265, and rule 130 of the chancery rules of 1844.

R. B. Gwillim, for defendants.

Trebing *v.* Vetter.

FREEDMAN, J.—In view of the character of the action and the proceedings therein, and there being a special affidavit showing a reasonable necessity for incurring the expenses for telegrams and lithographic copies, while no affidavit to the contrary was presented, the items of two dollars and thirty cents, thirty-eight dollars and eighty-four cents, and four dollars and sixty-five cents must be allowed.

TREBING, RESPONDENT, *v.* VETTER, APPELLANT.

CITY COURT OF BROOKLYN, GENERAL TERM;
JANUARY, 1883.

§ 450.

Actions against married women.—Common law rule in regard to liability of husband for personal torts of wife not abrogated.—He must be joined as a defendant in action for personal tort of wife.

The common law rule in regard to the liability of the husband for the personal torts of his wife has not been abrogated by section 450 of the Code of Civil Procedure ; and in an action against a married woman for her personal tort, the husband must be joined as a party defendant. Fitzsimmons *v.* Harrington (1 Civ. Pro. R. [1 McCarty] 860), approved. (Decided February 28, 1883.)

Appeal by defendant from an order of the special term overruling a demurrer to the complaint, interposed on the ground that there was a defect of parties defendant.

This was an action for slander brought against a married woman for words spoken by her, and her husband was not made a defendant in the action.

The defendant demurred to the complaint on the ground that there was a defect of parties defendant,

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inasmuch as the husband being liable for the personal torts of his wife, he should have been joined as a defendant.

At special term, McCUE, J., in overruling the demur-
rer, said : * * * "I concur in the view adopted by
RUMSEY, J., in *Fitzgerald v. Quann* (1 *Civ. Pro. R.* [1
McCarty] 273), in regard to the effect of section 450 of
the Code of Civil Procedure, as being in harmony with
the policy of the law. It seems unreasonable to sub-
ject the property of the husband to liability in causes
of action induced by, and arising from, separate acts of
the wife, in which the husband in no way joins, and as to
which he cannot control the wife, as in the present case.
As section 450 existed in 1877, the provisions were
broad and general and applicable to all causes of action
and proceedings affecting a married woman, whether
plaintiff or defendant. The amendment of 1879 does not
limit, in terms, the existing provision. It seems to have
been the legislative sense, that a married woman should
be regarded as a single female ; but that there might not
be even a doubt suggested that her independence was
not thorough and complete, the amendment was framed
so that it should be understood that the joining of a
husband with the wife was not only unnecessary but
also improper. I see no other construction to be given
to the section as a whole." * * *

Henry Fuehrer, for appellant :

Cited and relied upon *Fitzsimmons v. Harrington*, 1
Civ. Pro. R. (1 *McCarty*), 360 ; *Hoffman v. Lachman*,
Id. 278, note ; *Berrien v. Steele*, *Id.* 279, note.

John H. Clayton (*John Peterson*, attorney), for
respondent :

Cited and relied upon *Fitzgerald v. Quann*, 1 *Civ.*
Pro. R. (1 *McCarty*), 273.

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By the Court.—REYNOLDS, J.—The question raised and discussed upon this appeal is, whether the Code (§ 450) has abrogated the common law rule making the husband liable for the torts of the wife.

Our views in relation to the true construction and effect of the Code, in this respect, are so fully stated by Judge HAIGHT in *Fitzsimmons v. Harrington* (1 *Civ. Proc. R.* [1 *McCarty*] 360), that it will be unnecessary to go over the discussion.

We feel disposed to coincide with the result in that case, and accordingly reverse the order of the special term.

Judgment is given for the defendant upon the demur-
rer, unless plaintiff, within twenty days after entry and service of the order herein, amend his summons and complaint by adding the husband as a party defendant, which he may do upon payment of the costs of demur-
rer at special term. No costs of appeal to either party.

CLEMENT, J., concurred.

Crossman's Will.

IN THE MATTER OF THE PROBATE OF THE WILL OF
HENRY CROSSMAN, DECEASED.SURROGATE'S COURT, KINGS COUNTY; NOVEMBER, 1882;
JANUARY, 1883.

§§ 2647, 2481.

Wills executed in duplicate.—Not necessary to admit and record both duplicates.—What petition for probate of such will should contain.—When probate of one duplicate not to be revoked.—What difference between the duplicates is not material.—Newly discovered evidence.—Inspection of duplicate.—What is sufficient to revoke will executed in duplicate.—Rule in regard to testamentary instruments executed at the same time, but containing different provisions.

When a will is executed in duplicate, although each duplicate may be said to be a part of the will in the sense that it is not a separate will, yet, in the very nature of duplicates, each instrument is a complete will in itself, being a *duplicate original*; and it is not necessary to admit to probate and record both duplicates.* [1, 4, 11]

The petition for the probate of a will executed in duplicate, should describe the will as having been so executed, but the omission to so describe the will is an irregularity for which the probate of one of the duplicates

* If a testator execute a will, and afterward execute another, the last would not be a duplicate but a new will, *O'Neal v. Farr*, 1 *Birch. (S. C.)* 80, 88. But codicils containing the same provisions, executed at different times, have been held to be duplicates, *Hubbard v. Alexander*, 8 *L. R. Ch. D.* 738.

"The true definition of the term 'duplicate' is, a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and in its operation," *Toms v. Cuming*, 8 *Scott, N. R.*, 910, 917, opinion of *MAULE*, J. (S. C., 7 *Mann & G.* 88, 1 *Lutw. Reg. Cas.* 200.) "The very meaning of the term *duplicate*, is, that one document resembles the other in all essentials," *Id.* 916, opinion of *TINDAL*, C. J. These definitions are approved in *Lewis v. Roberts*, 11 *C. B.* 28, 29.

As to the construction of the word "duplicate," under particular facts, see *Benton v. Martin*, 82 *N. Y.* 383, again 40 *Id.* 345. And see, also, *Colling v. Treweek*, 6 *Barn. & C.* 394; *Birch v. Butler*, 5 *C. B.* 45; *Commonwealth v. Bearnish*, 81 *Pa. St.* 389; *Nelson v. Blakey*, 54 *Ind.* 29.

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should not be revoked, under section 2647 [¹. ². ³], both instruments being properly accounted for. Such irregularity does not affect the validity of the will or the competency of the proof thereof. ["]

Where the petition was otherwise regular, and the duplicate admitted to probate was plainly indorsed "Done in duplicate," and a next of kin had appeared and demanded an examination of the subscribing witnesses, and might, by such examination or by an inspection of the duplicate admitted to probate, have ascertained that the will had been executed in duplicate, but no such examination was insisted upon or inspection made.—*Held*, on application by said next of kin to vacate and set aside the decree admitting the will to probate, that the court had acquired jurisdiction as to such next of kin [¹], that the probate was not a nullity ["], and that while the indorsement upon the will was no part of the will itself, it was a circumstance going far to show that the proponents did not attempt to conceal the fact that the will had been executed in duplicate. [¹]

Assuming that the surrogate has power to vacate the decree admitting a will to probate on the ground of newly discovered evidence, under subdivision 6 of section 2481, such evidence must be considered in connection with that already adduced and must be such as would probably change the result. [¹] Under what circumstances the fact that a will has been executed in duplicate is not sufficient to vacate the decree admitting one of the duplicates to probate, on the ground of newly discovered evidence. [¹. ²]

Where, after the probate of a will executed in duplicate, one of the duplicates is found to have an interlineation and a note thereof not contained in the other—the note of the interlineation being directly opposite the testator's signature and immediately above the attestation clause, the duplicates, interlineation and note thereof all being in the same handwriting, and the matter interlined being contained in the body of the other duplicate.—*Held*, that there was no material difference between the duplicates, which would authorize a revocation of the probate of the will on the ground that the duplicates were not similar and identical. [². ¹]

It seems that on the probate of a will executed in duplicate, an inspection of the duplicate not offered for probate would be allowed for the purpose of comparison ["]

What is sufficient to work a revocation or alteration of a will executed in duplicate. [¹. ². ³. ⁴]

The rule in regard to the probate and effect of two or more testamentary instruments executed at the same time, but containing different provisions, stated. ["]

Matter of Forman's Will (52 Barb. 274), distinguished. ["]

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Applications to revoke the probate of a will executed in duplicate.

The interlineation referred to in the opinion of Bergen, S., was contained in the body of the duplicate admitted to probate.

The applications are intimately connected and conveniently reported together.

The facts of both applications are detailed in the opinions.

Henry L. Clinton & J. T. Marean (*W. B. Putney, attorney*), for the applications.

Henry W. Bookstaver (*James R. Steers, attorney*), opposed.

LIVINGSTON, Surrogate.—This is an application under sections 2647-2653 of the Code, to revoke the probate of the will of Henry Crossman, deceased.

The will was executed in duplicate, but only one of the duplicate parts was produced and proved on the probate, and no mention was then made of the other part, nor did it then appear that the will had been executed in duplicate. That fact was first made apparent on this proceeding by the testimony of Mr. Zener, one of the subscribing witnesses, and the duplicate part of the will, not produced on the probate, was admitted in evidence in this proceeding, for the purpose of showing that it was in every respect an exact duplicate of the will admitted to probate, and had not been in any way altered since its execution.

The proponents having rested their case, a motion is now made for a decree revoking the probate of said will, on the ground that only part of it was admitted to probate. No question arises as to the destruction, alteration or revocation of the duplicate part not produced on the original probate. It is not pretended that

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it is not now in the same condition in every respect as the other part which was produced on that occasion. The contention is, that a will executed in duplicate consists of both duplicate parts ; that neither constitutes the whole will, and that, consequently, such a will has not been admitted to probate, if only one of its duplicate parts has been proved. This would, no doubt, be so, if the several instruments, instead of being duplicates contained different provisions. It is, undoubtedly, the general rule, that two or more testamentary instruments, executed at the same time, by the same testator, are to be construed together and viewed as one will, and must be admitted to probate as such, (In the Matter of Forman's Will, 54 Barb. 274, 284, 285).

[¹] But where a will is executed in duplicate, although each duplicate may be said to be part of the will in the sense that it is not a separate will, yet, from the very nature of duplicates, each is the complete will in itself, since each part is a *duplicate original*, (*The Touchstone* [1st Am. ed.], 53, note 1; 2 *Phillips on Ev.* 544). As was said by Judge MAULE, in *Doe v. Strickland* (8 *Com. Bench*, 746), "Each part fully and entirely expresses the will and intention of the testator." And it is upon this theory that the revocation or intentional and final alteration of one of the parts, by the testator, is held to be a revocation or alteration of the whole will. So considered, it would [²] be unnecessary to admit to probate and record both duplicates ; and this view is sustained by the practice followed in the surrogate's court of New York, on the probate of the will of Ann Seaman, and in this court, in the case of the will of Austin D. Moore. Both of these wills were executed in duplicate, but only one part was admitted to probate and recorded. So in *Doe v. Strickland*, *supra*, only the altered duplicate part found in the possession of the testator was proved and

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admitted to probate ; and yet, if the theory of counsel for the petitioners is correct, there is the same necessity for admitting to probate and recording both duplicates where one of them has been altered as where no alteration has been made in either, since the change in the one does not destroy or annul the other, but only [5] effects the same alteration in both. Still, on the probate of a will executed in duplicate, the petition should describe the will as having been so executed, so as to inform the parties in interest of that fact, which it is very material for them to know, and the part kept by the testator must be produced or accounted [6] for, as, in case it cannot be found, the presumption is that he has destroyed it with the intention of revoking his will, (*Wms. on Executors.* 158). But, as said before, no such question arises in this case, as it appears that both duplicate parts were in the possession of the testator, and that neither was destroyed or altered by him.

[7] The petition for the probate of the will was probably irregular, in not properly describing the will as having been executed in duplicate, but the probate is not to be revoked, in this proceeding, for that reason.
[8] The irregularity does not affect the validity of the will or the competency of the proof thereof, (*Code,* § 2647).

The motion to revoke the probate must be denied on the evidence as it now stands, and the proceeding may be entered on the day calendar for contested matters for further hearing, on the application of either side on eight days notice to the other.

Let an order be entered accordingly.

BERGEN, Surrogate. — This is an application on behalf of George W. Crossman, one of the next of kin of the decedent, to set aside and vacate the decree made by the

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surrogate, January 28, 1881, admitting the last will and testament of Henry Crossman, deceased, to probate, and to revoke the letters testamentary thereupon issued; and is made pursuant to subd. 6 of section 2481 of the Code of Civil Procedure.

The grounds upon which this motion is made are — First, that only a part of the will was admitted to probate on that day ; Second, that (the will being in duplicate) both duplicates should have been presented for probate and adjudicated upon at that time ; and Third, that the duplicate parts are not identical.

The first question which presents itself, and was strenuously insisted upon by the learned counsel for the motion, is, that the surrogate, in admitting the will to probate, January 28, 1881, acted without jurisdiction, from the fact that it did not appear in the verified petition presented to him that the will was described as having been executed in duplicate, and thereby misled the parties cited to appear at the probate thereof.

Let us first see what the statute requires, and then refer to the proceedings to ascertain if it was complied with. Section 2614 of the Code of Civil Procedure provides as follows : "A person designated in a will as executor, devisee, or legatee, or any other person interested in the estate, or a creditor of a decedent, may present, to the surrogate's court having jurisdiction, a written petition, duly verified, describing the will, setting forth the facts upon which the judgment of the court to grant probate thereof depends, and praying that the will may be proved, and the persons specified in the next sections, may be cited to attend the probate thereof." * * *

By referring to the proceedings on file, I find that Henry C. Crossman, the executor named in the will of Henry Crossman, deceased, presented a verified petition on the 17th day of January, 1881, which contains the

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following description of the will : " Said last will and testament relates to both real and personal estate, and bears date the 29th day of November, 1879, and was signed by Richard H. Bowne and George W. Zener, as witnesses." That thereupon the surrogate issued citations to all the parties in interest, returnable January 28, 1881, and that, on the return day, George W. Crossman, the person who makes this motion, appeared by counsel who filed his written appearance, in which he demanded the right to examine the witnesses who might be adduced to prove the will.

The will was plainly indorsed "Last Will of [¶] Henry Crossman. Done in duplicate." It is now contended that, inasmuch as the will was not described in the petition as having been executed in duplicate, the probate thereof was a nullity. To that proposition, I cannot accede. From all that appears by the record, the will was fully described, and all the facts necessary to give the court jurisdiction were alleged in the petition. There was nothing concealed, for it appears that the will probated was indorsed "Done in duplicate" so plainly that any person examining the will could not avoid noticing it. While it is true that the indorsement on the will is no part of it, still it goes far to show that the proponents did not attempt to conceal the fact that the will was executed in duplicate. Had the contestant examined the will, or the subscribing witnesses on the probate, as he demanded in his written appearance the right to do, he certainly would have discovered that it was executed in duplicate.

It was not contended by the applicant for this motion that the will of Henry Crossman was not properly executed, or that he was not a resident of this county; but, on the contrary, it appears that the will was properly executed, and the testator was a resident of this county, and that George W. Crossman, if he were not personally

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present in court when the will was probated, had filed his written appearance and was represented by counsel, yet he made no objections to the probate. ["] So far as he was concerned, the court acquired jurisdiction. (See *Allen v. Malcolm.* 12 Abb., N. S., 335; *Morrell v. Dennison,* 8 Abb. 401).

Having disposed of the question of jurisdiction in the original proceeding, I am now asked, upon newly discovered evidence, to vacate the decree made admitting the will to probate January 28, 1881.

The motion papers are all based upon the evidence of George W. Zener, one of the subscribing witnesses to the will, in another motion pending in this court for the same purpose, made under section 2647 of the Code of Civil Procedure. In that proceeding, allegations were filed against the validity of the will, within one year after the recording of the decree admitting the will to probate, and the trial upon those allegations was commenced before my predecessor, on the second day of June last, and is still continued in this court. Upon the examination before Judge LIVINGSTON, it was developed in the testimony of said Zener that the will had been executed in duplicate. Upon that fact appearing, a motion was made by the applicant in this motion and his co-contestants to revoke the will admitted to probate, upon the ground that only a part of the alleged last will and testament of Henry Crossman, deceased, had been admitted to probate on the 28th of January, 1881, and that both duplicates should have been presented for probate and adjudicated upon. That motion was argued at length by counsel on both sides, and a decision was made by Judge LIVINGSTON denying the motion in which he says: "But when a will is executed in duplicate, although each duplicate may be said to be part of the will in the sense that it is not a separate will, yet, from the very nature of duplicates, each is

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the complete will in itself, since each part is a *duplicate original*. * * * Each part fully and entirely expresses the will of the testator." In my opinion, this is a correct and clear statement of the law.

[¹²] But the counsel contend, that this motion is based upon a further and additional fact not presented on the former motions; viz., that the duplicate is not in all respects similar and identical with the will admitted to probate, but that it contains one or more important interlineations and erasures. I have carefully examined the will and duplicate, but did not discover any important interlineations or erasure, except that, on the eighth page in the clause appointing his executors, the words "*and my son Henry C. Crossman*" were interlined, which interlineation is noted at the foot of the will directly opposite the testator's signature, and immediately above the attestation clause, as having been interlined before execution. Both the will admitted and the duplicate are entirely in the handwriting of George W. Zener, one of the subscribing witnesses, including the above interlineations and note of it, with the exception of the signature of the testator and the signature and address of Richard H. Bowne, the [¹³] other subscribing witness. I can, therefore, see no material difference between the duplicates, which would lead me to revoke the probate on this ground.*

* A case of peculiar facts, and in which the alteration by the testator of one of the duplicates of a will, retained by him, was held not to intend intestacy, nor to amount to a revocation, and sentence was given for the unaltered duplicate in possession of the executor, is that of *Hide v. Mason*, decided 1784, related in 8 *Viner's Abr.* 140, as follows:

" Samuel Mason, of Westminster, Esq., 23 June, 1729, made his will, and two duplicates of it were executed before three witnesses, and Mr. Limbrey and Dr. Calamy (deceased) were made executors, and one of the duplicates was delivered to Mr. Limbrey, one of the executors. Samuel Mason died 2 Oct., 1780; and, about three weeks before his death, made

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[¹⁴] In the Matter of Forman's Will (54 Barb. 274), cited by the learned counsel for the motion, there were two wills executed at the same time, which contained provisions so repugnant to each other that the surrogate declined to say which was the last will, and therefore admitted both to probate, requiring them both to be construed together. But no such difference exists in the case at bar as to require both to be probated to enable the court to construe them ; for there is nothing

several alterations and obliterations, with his own hand, in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatee and executors, and altered several of the former legacies, and inserted or interlined new legacies. And soon after wrote another will, with his own hand, agreeable, in great measure but not altogether, to the will, or duplicate so altered, with the conclusion in these words : 'In witness whereof, I, the said testator, have to each sheet set my hand, and to the top where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date, this day of , 1780.' But there was no signing or fixing together. Testator soon after began to write another will, word for word with the last so far as it goes, but went no farther than devising his lands.

"Testator lived six days after, and was in good health, and might have finished and executed both or either of the latter wills, if he had thought fit. Testator never sent to, or called upon, Mr. Limbrey for the duplicate of the first will in his hands, though Mr. Limbrey lived here in town. After death of testator, all the testamentary papers or schedules were found lying all in loose and separate papers, upon a table in his closet, not signed or executed, and the duplicate of the first will was found on the same table altered and obliterated (*ut supra*) with his name and seal thereto, whole and uncancelled.

"Upon contest in the prerogative court, sentence was given for the duplicate of the first will in Mr. Limbrey's hands; and, upon appeal to the delegates, the sentence was confirmed by Lord Raymond, Ch. J. of B. R., and Mr. Justice Probyn, Dr. Tindall and Dr. Bramston (who were all the delegates present), after four days' solemn hearing.

"And upon petition of Hide (the executor named in the new mentioned will) a commission of review was granted; the petition was heard before Lord Chancellor King, 16th or 17th of March, 1783; and, now, after farther hearing, etc., before the commissioners of review, the former

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in the one which is not in the other, except the note of interlineation at the foot of the will.

[¹⁵] The doctrine laid down in the English cases cited; viz., that the cancellation of one of the duplicates by the testator is a revocation of the other, is undoubtedly correct; but in none of them do I find that, if both duplicates had been in existence unrevoked, it would have been necessary to offer both for probate; it was simply whether the cancellation of the one worked a revocation of the other.*

sentence of the prerogative court was again affirmed by opinion of all the delegates, except Dr. Pinfold; viz., of the judges, the Ch. Baron Reynolds, Justice Page and Baron Comyns, and the two doctors of the civil law; chiefly on the reason (*ut audiri*), that the testator did not intend an intestacy, and by the alterations and obliterations in his own duplicate of his first will, he appeared only to design a new will, which, as he never perfected, the first ought to stand, and testator not calling for, etc., the duplicate of his first will in Mr. Limbrey's hands, strengthens the presumption of his intent not absolutely to destroy his first will till he had perfected another, which he never did."

In *Goodright v. Glazier* (4 *Burrow*, 2512, decided in 1770), the case of *Hide v. Mason*, *supra*, was referred to by Lord Mansfield, but under the name of *Mason v. Limbrey*. The report says: "Lord Mansfield mentioned a cause at the delegates, between *Mason v. Limbrey*, where the testator, Samuel Mason, had made his will, of his real and personal estate, and properly executed two duplicates of it, one of which duplicates he kept in his own hands, the other he delivered to Mr. Limbrey. A little before his death, he greatly altered and obliterated his own duplicate, and begun to write over a new will, but never finished it, nor did he ever apply to Limbrey to get back his duplicate. Sentence was given for the duplicate of the first will remaining in Mr. Limbrey's hands, for the imperfect sketch of the unfinished second will was no revocation of the first. He did not mean to die intestate." * * *

Although *Hide v. Mason* is given by Viner as a MS. case, a report of the case, before the delegates, may be found under the title of *Calamy & Limbrey v. Hyde & Mason*, 1 *Lee. Ecc. R.* 423, *note*; and *Limbrey v. Mason & Hyde, Comyne*, 451.

Under the R. S., the obliteration of a clause in a will, by the testator, is not effectual as a revocation unless it altogether destroy the entire will. *Lovell v. Quitman*, 88 *N. Y.*, 377, affirming 25 *Hun*, 587.

* We have not the benefit of counsels' points in this case. The English

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[¹⁶] In the case of *Killican v. Lord Parker* (*1 Lee Ecc. R. 662*), the court granted an inspection of the duplicate upon the demand of the contestants, and directed it to be left with the court; but it was not required to be probated. Had the question been raised on the original probate of this will, the surrogate might, upon the demand of the contestants as in the case last cited, have granted an inspection of the duplicate not probated, for the purpose of showing that the duplicates were identical and had not been altered.*

[¹⁷] I shall assume in this case that the surrogate has the power to open, vacate and annul a decree as provided in subdivision 6 of section 2481 of the Code,

cases on duplicate wills treat principally of cancellation and revocation. See, in addition to *Doe v. Strickland, supra*, and *Killican v. Lord Parker, infra*, and cases cited in the foot notes to this case, *Rickards v. Mumford, 2 Phillim. 28*; *Colvin v. Fraser, 2 Hagg. Ecc. 266*; *Burtonshaw v. Gilbert, Corp. 49*; *Onions v. Tyrer, 1 P. Wms. 844, S. C., 2 Vern. 742*; *Pemberton v. Pemberton, 18 Ves. Ch. 290, 310*; *Boughey v. Moreton, 2 Lee Ecc. 532, S. C., 3 Hagg. Ecc. 191, note*; *Payne v. Trappes, 1 Robertson Ecc. 583*; *Roberts v. Round, 3 Hagg. Ecc. 548*; *Sir Edward Seymour's Case, referred to in 1 P. Wms. 846; Com. 458; 2 Vern. 742*; *Saunders v. Saunders, 6 Notes of Cas. 518*.

* In *Killican v. Lord Parker (supra, sometimes cited, 1 Cas. temp. Lee 662; Prerogative Court, decided 1754)*, the proponent having offered one duplicate for probate, the contestants prayed for "scripts and scrolls" (which meant that the proponent should state what testamentary papers he relied upon and exhibit the originals thereof). It then appearing that the will was executed in duplicate, the contestants prayed that the other duplicate might be brought into court and there inspected; "for observations may arise upon view of it." To this the proponent objected, on the ground that the will having been executed in duplicate for greater security, he should not be required to lodge both duplicates in the same court, which would defeat such security; and further, that, as the will related to both real and personal estate, he required the duplicate not probated to prove the will in chancery, but that he was ready to produce such duplicate whenever the court should order. Sir George Lee, in giving judgment upon this question, observed: "I was of opinion nothing was offered on the part of Killican, but what may not be suggested in every case; that as to proving it in

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upon sufficient grounds being shown therefor ; but upon the ground of newly discovered evidence, such new evidence must be considered in connection with the evidence adduced on the trial, whether it is such as would probably change the result.

In the Matter of the Accounting of Ermand, Executor (12 *Weekly Dig.* 90 [S. C., more fully, 24 *Hun*, 1]), it was held by the general term of the third department, that the surrogate had power, under section 2481 of the Code, to open a decree to correct a palpable mistake, but that he did not have the power to vacate and set aside a decree to enable the question to be litigated and determined, whether there has been a mistake made in the provisions of a decree entered. And in a still more

chancery, the course was for the officer of this court to attend with the will for that purpose ; that if it was to be lodged in chancery, he could not perform his offer of attending with it at all times this court should require ; that it was the constant rule to bring in all testamentary papers when required, and that a duplicate is part of the will. I ordered it to be brought in, which was done accordingly."

Both Livingston and Bergen, 88, agree that each duplicate is a part of the will only in the sense that it is not a separate will. Killican v. Lord Parker seems to have been merely an application to compel the bringing of a testamentary paper into court. See Cunningham v. Seymour, 2 *Philim.* 250 ; Brown v. Dinmore, 1 *Add.* 845; Bethun v. Dinmore, 1 *Lev. Rec.* R. 158; Georges v. Georges, 18 *Ves. Ch.* 294. For the present English practice on this point, see 20 and 21 Vict., ch. 77, §§ 26, 89 ; *Id.*, ch. 95, §§ 23, 27 ; 21 and 22 Vict., ch. 96, § 27.

In *Cook's (English) Probate Practice* (8th ed., 1878), 50, title "Probate," it is said : "If the will exists in duplicate, the executors will prove one part only. They will, however, be called upon to file the other part; though, as I have said, it is not required to be proved.

"If the other part cannot be produced, its absence will have to be accounted for. In respect of the absence of the other part, a question of law may arise." But see the facts of *Hubbard v. Alexander* (3 *L. R. Ch. D.* 738), where it appears that duplicate codicils were admitted to probate.

In *Wright v. Sarmuda* (2 *Philim.* 266, 275, note), Sir Wm. Wynne, in delivering the judgment of the prerogative court, remarked: "The office never asks for a duplicate."

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recent case, the Matter of the Application of Becker to Revoke the Probate of the Will of Henry Sittig (15 *Weekly Dig.* 446), the general term of the first department held: "That strong and controlling reasons should be presented to the court for extending the time within which such applications should be made beyond the one year fixed by statute."

[¹²] After a careful examination of the whole case, I am satisfied that the newly discovered evidence is not such as to warrant me in vacating the decree admitting the will to probate; and, for the further reason, that, there is another proceeding now pending before the surrogate's court, under section 2647 of the Code, to revoke the probate of the will of Henry Crossman, where the main question in this motion has been fairly and pointedly raised, and all the rights of the applicant herein can be fully protected in that proceeding.

The motion to revoke the probate must be denied, with costs.

Let an order be entered accordingly.

Ramsden v. Ramsden.

RAMSDEN, RESPONDENT, v. RAMSDEN, APPELLANT.*

**SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM ;
OCTOBER, 1882.**

§§ 1756, 1763, 1766, 1769.

In what actions an order requiring the husband to pay alimony or a counsel fee can be granted. — What must appear to sustain such order. — An action for separate maintenance can be sustained by wife, only in cases where an action for separation would lie. — When parties married without the State, what is the requirement as to residence. — Construction of subds. 1 and 3 of section 1763.

It is only where actions for divorce or for separation would lie that an order can be made requiring the husband to pay alimony *pendente lite* or a counsel fee, under section 1769 ; and to sustain such an order, it must be made to appear on the plaintiff's statement that a case of such a nature exist in her favor, and the facts of the case must be such as would lawfully authorize the bringing of the action. [1, 8, 11]

An action for separate maintenance cannot be sustained by a wife against her husband, except where the facts are such as would justify a decree of separation ; and an action for a decree of separation cannot be maintained where the parties have been married without the State and become residents of the State, unless the residence has been such as is required by subd. 3 of section 1763. [1, 4, 9, 10]

Accordingly, where an order was made requiring a husband to pay alimony *pendente lite* and a counsel fee, in an action for separate maintenance brought by the wife, the parties having been married abroad and both having become residents of the State at the time when the action was commenced, the husband having resided in the State for several years but the wife less than one year, — *Held*, that notwithstanding the fact that both parties were residents of the State at the time when the action was commenced, it could not be maintained, [1] because the wife had not been a resident of the State for one year prior to the commencement of the action, a residence of that length, in the plaintiff's situation, being necessary in order to maintain an action for separation; [1] that as an action for separation would not lie, the order directing the payment of alimony and counsel fee was unauthorized. [1, 11]

* The order made by the general term on this appeal was affirmed by the court of appeals, but upon another ground; see *post*, p. 418.

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Subd. 3 of section 1768, provides that, "Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year and the plaintiff is such a resident when the action is commenced," an action for separation can be maintained. And although subd. 1 of that section provides that such an action may be maintained, "Where both parties are residents of the State," the plaintiff's case was within subd. 3 and not within the general terms of subd. 1, and in order to entitle her to maintain an action either for separation or for a separate maintenance a residence of one year within the State, before the commencement of the action, was necessary, although in other respects the facts of the case were such as would have entitled her to a decree.^[3, 4, 10] The requirement as to residence being clearly and explicitly expressed in subd. 3, that subd. cannot, in such a case, be disregarded because of the general terms of subd. 1, and is to be followed in preference to subd. 1. [8, 9]

(Decided November 24, 1882.)

Appeal by defendant from an order of the special term requiring him to pay to the plaintiff, his wife, the sum of \$20 per week alimony *pendente lite*, and to her attorney the sum of \$250 as a counsel fee.

This action was brought by the wife to procure a judgment requiring the husband to provide for her maintenance and support; and conceded to have been brought for such purpose and for no other.

The complaint alleged as the jurisdictional fact, that both the plaintiff and defendant were actual residents and inhabitants of the State at the time when the action was commenced. The defendant was charged with adultery, committed without the State, cruel and inhuman treatment, inflicted without the State, and with abandonment and neglect, and refusal to provide for the support of the defendant. In respect to the charge of adultery, there was no allegation as to the absence of condonation, nor that five years had not elapsed since the discovery of the offense. (See Rule 73 of the General Rules of Practice.)

The relief prayed for by the complaint was: "That

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the plaintiff have judgment and decree against the defendant:

"First. That the defendant pay to plaintiff a sum certain for her maintenance and support, sufficient to enable her to live and maintain her proper condition in life as the lawful wife of the defendant, and that he be required to give security for the said payment, and for his appearance to abide the order and judgment herein, and that on the head of said decree, plaintiff be permitted, on any warrantable state of facts occurring subsequent to its entry, to apply for such further and additional sums as may be just.

"Second. That she have such temporary allowance, by way of alimony and counsel fee for the proper prosecution of her said action for maintenance, &c., as to the court may seem meet, with costs; and for such other and further relief as this court deems just and proper, with costs."

The further facts are stated in the opinion.

John V. B. Lewis (*Lewis & Beecher, attorneys*), for appellant:

It is conceded that the only object of this action is to obtain a judgment for separate maintenance. Alimony cannot be granted unless, upon the plaintiff's showing, there exists a right to a divorce or a separation. It is an incident to such actions, and cannot be granted in any other classes of actions, *Code of Civ. Pro.*, § 1769. As the facts do not warrant a divorce, and as the plaintiff purposely abstains from asking for a separation, and the relief demanded is for money only, the action cannot be regarded as one for either a divorce or a separation, 2 *Bish. on Mar. & Div.* §§ 351, 354-359, and cases cited; *Ball v. Montgomery*, 2 *Ves. Jr.* 191, 195; *Atwater v. Atwater*, 36 *How.* 431; *Douglas v. Douglas*, 5 *Hun*, 140, 144.

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Subd. 1 of section 1763, was intended to have an application limited by subd. 3 of that section. Subds. 1 and 2 apply to marriages which have taken place within the State, and where both parties reside, or only the plaintiff resides, within the State. Subd. 3 was expressly intended to apply to foreign marriages, and the requirement as to the time of residence must be complied with in order to confer jurisdiction. It is unreasonable to suppose that subd. 3 was intended solely for the purpose of providing for the remote case of a foreign marriage where the parties have resided within the State for a year and the defendant has then left the State. It would be a strained construction to require a year's residence in this single case. This subd. was intended to provide for just such a case as the one at bar. A marked distinction is to be made between a home and a foreign marriage. The legislature intended, by subd. 3, to prevent the courts of this State from being made a "free mart" of divorce for strangers; and, to prevent abuse, a residence of one year is required as evidence or an intent to remain within the State.

In a matrimonial action, and where, as appears by the facts of this case, the parties have lived apart, the common law maxim that the domicile of the wife follows that of the husband does not apply, and the deficiency of the wife's residence cannot be made up from that of the husband. *Venee v. Venee*, 15 *How.* 497; *Hopkins v. Hopkins*, 35 *N. H.* 474; *Schoenwald v. Schonwald*, 2 *Jones Eq. (N. C.)* 367, 369; *Pate v. Pate*, 6 *Mo. App.* 49; *Dutcher v. Dutcher*, 39 *Wis.* 651; *Harteau v. Harteau*, 14 *Pick.* 181; 2 *Bish. on Mar. & Div.* § 125.

J. Tredwell Richards (Richards & Brown, attorneys), for respondent:

That provision of section 1766 of the Code in relation

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to a judgment for separate maintenance, without a separation, is substantially a re-enactment of 2 R. S. 147, § 55, which was taken from 2 R. L. (Revision of 1813) 200, § 11.

Under section 1766 a judgment for separate maintenance may be rendered in all cases where any of the causes specified in section 1762 are shown to exist. There is no legislative intent to introduce a change in this respect, and this provision of the Code should receive the same construction as the prior acts, and under them, an action for separate maintenance could be maintained. *Turrel v. Turrel*, 2 Johns. Ch. 391; *Davis v. Davis*, 75 N. Y. 221.

If the court has power under section 1766 to render a judgment for both separation and for separate maintenance, or for either a separation or a separate maintenance, it is competent for the plaintiff to demand relief in either form. Such relief as the court upon the facts has power to decree, the plaintiff may pray for in her complaint. If the court can grant maintenance apart from other relief, then the plaintiff may demand that relief alone. The relief asked constitutes no part of the cause of action, it simply defines and limits the character of the judgment sought. All that is essential is, that the prayer shall demand some substantial relief, which the court has power to grant upon the facts alleged. It would be unnecessary to add to a prayer for maintenance a further prayer for a separation, when the plaintiff has no intention of availing herself of any relief under that part of the prayer. To pray for relief which is not really sought is not merely a formal absurdity, but it is misleading to the defendant. A defendant might be willing to allow, without defense, a decree for maintenance where he would defend against a prayer for a separation and custody of children. If the plaintiff can waive her right to a separation and preserve her

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right to maintenance, she can do so in the prayer for relief, as well as upon an application to the court for judgment. The policy of the law is to favor the marriage relation, and a construction should not be given to the section which will compel a wife to demand a separation in order to procure necessary support, when there is no desire on the part of the wife for a separation.

Alimony pendente lite may, under § 1769, be granted in an action brought as prescribed in Articles 2 and 3 of Title 1 of Chap. 15, §§ 1756-1767. This action is brought under the provisions of §§ 1762, 1763, 1766.

A residence by the plaintiff for one year within the State was not necessary to confer jurisdiction. *Bona fide* residence by both parties within the State at the time of the commencement of the action was sufficient for that purpose. The case comes under subd. 1 of § 1763, and not subd. 3. By § 1768 a married woman is deemed a resident of the State if she dwell therein when she commences her action against the husband. The whole of § 1763 should be read together, and be so construed as to give effect to each subdivision. Two classes of cases are contemplated: First; Where jurisdiction depends upon the residence of both the plaintiff and the defendant, within the forum at the time of the commencement of the action. Second; Where jurisdiction depends on the residence of the plaintiff alone, within the forum at the time of the commencement of the action. It is the latter class of cases to which subds. 2 and 3 apply. If subd. 1 does not cover the case at bar, it has no application in any case and is mere surplusage. It does not apply where the parties were married within the State for that fact is sufficient under subd. 2, if the plaintiff alone reside within the State when the action is commenced. It does not apply where the marriage has taken place without the State, except as to the residence of the plaintiff alone, at the time when the action was

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commenced, both parties having at some time resided a year within the State. But to give the section such a meaning as is consistent with a purpose to provide for cases not within subds. 2 and 3, subd. 1 should be held to apply to cases where the marriage has taken place without the State and the parties have not been residents of the State for one year, but are both residents at the time when the action is commenced.

By the Court. — DANIELS, J. — The action has not, in terms, been brought either for an absolute divorce or a separation of these parties, but its object, as that has been stated in the complaint, is to obligate the defendant to pay to the plaintiff a certain sum for her maintenance and support, sufficient to enable her to live and maintain her proper condition in life as the lawful wife of the defendant. The parties were married in Germany, and the defendant about the year 1875 took up his residence in the city of New York, where he has ever since then resided. The plaintiff herself, according to her own statements, followed him here in September, 1881, and from that time she resided in the city, until April, 1882, during which month this action was commenced by her. Her residence at that time in this State had extended over a period of only about seven months, and the point is therefore presented, whether, under this state of facts, [1] she is capable of maintaining her action. For it is only when an action is brought in a case prescribed and defined by the present Code of Civil Procedure, that an order can be made requiring the husband to pay any sum of money to enable her to carry on her suit, or to provide for her support during its pendency (*Code*, § 1769). The actions referred to by this section are two-fold in their character. The object of one is to obtain an absolute divorce because of the conjugal infidelity of the defendant; and, although such misconduct is

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alleged against the defendant, this allegation was not made for any ulterior purpose of this description. For neither of the other essential allegations on which successful prosecution of such an action has been made to depend, has been set forth in the complaint. And if they had been, the plaintiff could not have succeeded, for the reason that her marriage, and also her residence abroad at the time when this act is alleged to have been committed, would preclude her from maintaining an action to obtain an absolute divorce (*Code Civil Procedure*, § 1756). The case which she could present, depending on this misconduct, would not be within either subdivision of this section, and, accordingly, that measure of relief could not be awarded to her.

As her foreign marriage and residence prevent her from maintaining an action for an absolute divorce, the success of her suit is necessarily dependent upon the other

class of cases provided for, as the facts have been set
[¶] forth in her complaint. And they do disclose a case which would entitle her to a separation, if her residence in this State has been sufficiently prolonged to authorize her to commence such an action. Without this required residence, no suit, even for a separate maintenance, can be regularly prosecuted by her.

[¶] And that was the construction which was given to the statute immediately preceding the adoption of the present provisions of the Code. And by that construction, it was held that the wife could only secure a separate maintenance when a case was presented by her which would justify a decree of separation. *Atwater v. Atwater*, 38 *How.* 431; *Douglas v. Douglas*, 5 *Hun*,

[¶] 140; *Davis v. Davis*, 75 *N. Y.* 221. And this construction has been expressly sanctioned by the present provisions of the law, for they restrict the powers of the court to "such an action" as has been provided for by the preceding sections of the same article, and that

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excludes all cases where the facts and circumstances are not such as to justify a decree of separation. (*Code [¶] of Civil Procedure*, § 1766.) To sustain the right of the plaintiff to a decree providing for her maintenance, or to an order requiring the husband during the pendency of the action to provide for her support, it must, accordingly, be made to appear, that a case exists in her favor of the nature of one of those defined by these preceding provisions of the statute. And as the plaintiff has shown by her statements that she is not entitled to an absolute divorce, the facts must be such as would authorize a decree of separation to entitle her to succeed upon this appeal. And for that purpose it must appear, that she was within one of the requirements prescribed as to residence by section 1763 of the Code. For it is only in the cases so provided for that an action for a separation or separate maintenance can be maintained in this [¶] State. It has been urged that such a right of action has been made to appear, because of the fact that both parties were residents of this State at the time when this action was commenced, and that is the literal effect of the first subdivision of this section. But it is very plain from the language in which the third subdivision of the same section has been enacted, that the first was not designed to be so broadly understood [¶] or construed. For, by the latter subdivision, the right of a party situated as the plaintiff was, to maintain such an action when this suit was commenced, has been very clearly defined and declared. Its language is that it may be maintained, "Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced." [¶] The plaintiff's case is very plainly within the

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language of this subdivision, and as the residence required to enable her to maintain her action has been so explicitly defined by it, the argument of her counsel, that it may be included within the general terms of the first subdivision of the section, must be rejected as unsound. These two subdivisions may be somewhat inconsistent, but even if they are, the clear and ["] explicit terms of the latter require that to be followed in this case in preference to the former; for by it the legislature has, in effect, declared that a person who has married out of this State cannot maintain an action for a separation without a year's preceding residence in this State. This restraint has been clearly created and expressed, and it cannot be disregarded because of the general terms made use of in the enactment of ["] the first subdivision of the section. To maintain any action by her, whether it be for a separation, or only for separate maintenance which must be made dependent upon substantially the same facts, a year's residence in the State was requisite before it could ["] be lawfully instituted. Without that residence, the action cannot be brought, as it has been prescribed it may be by the provisions of the Code. And as it has not been so brought, the order from which the appeal has been taken was unwarranted and unauthorized.

The order, therefore, should be reversed, with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concurred.

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RAMSDEN, APPELLANT, *v.* RAMSDEN, RESPONDENT.

COURT OF APPEALS ; JANUARY, 1883.

§§ 1762, 1766, 1769.

Action by wife for separate maintenance cannot be sustained.—An order for payment of alimony pendente lite and a counsel fee is unauthorized in such an action.—Only in action for a separation that judgment for separate maintenance can be rendered.—Action for separation is statutory, and must be brought for the relief prescribed.—Judgment for separate maintenance only, is discretionary.

An action for separate maintenance only cannot be sustained by a wife against her husband; and an order directing the payment of alimony *pendente lite* and a counsel fee, in such an action, is, therefore, unauthorized.

Although in an action for a separation the court may, under section 1766 of the Code, render a judgment for maintenance without rendering a judgment of separation, the discretion to grant the former relief and to withhold the latter is confided to the court, and its exercise cannot be limited by a demand of the plaintiff for separate maintenance alone; that relief can only be granted when the action is brought for a separation.

An action for separation is a statutory one, and must conform to the terms of the act by which it is permitted, and the nature of the relief being prescribed, it is only when it appears from the complaint that the object of the action is to procure a separation that the court can grant less than is demanded by the plaintiff, and render a judgment for separate maintenance.*

* Mr. Throop, in a note to section 1766 of his edition of the Code, says:
* * * "The second and third sentences are a substitute for § 55 of the *R. S.* (2 *R. S.* 147), the language of which is obscure. They express the construction given to that section in *P— v. P—*, 24 *How. Pr.* 197, and *Kassel v. Becker*, 25 *Id.* 873."

In *P— v. P—*, *supra*, the action was for a separation on the ground of cruel and inhuman treatment; and, while the relief of a separation was denied, on the ground of condonation and the absence of any present danger of violence, maintenance was decreed to the extent that the wife should receive a sum certain for the purchase of clothing and other necessaries, although still continuing to find a home with her husband.

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2 McC. Civ. Pro. R. 408, affirmed on another ground. Davis v. Davis (75 N. Y. 221), and Turrel v. Turrel (2 Johns. Ch. 391), explained.

Atwater v. Atwater (36 How. 431, S. C. 53 Barb. 621), approved as being the true construction of *2 R. S.* 147, §§ 54, 55.

(Decided February 6, 1888.)

Appeal by plaintiff from an order of the general term, supreme court, first department, reversing an order of the special term, requiring the defendant to pay alimony, *pendente lite*, and a counsel fee. (Reported below, *2 McC. Civ. Pro. R.* 408, and here affirmed).

The facts are sufficiently stated in the report below, *ante*, p. 408.

J. Tredwell Richards (*Richards & Brown*, attorneys), for appellant.

John V. B. Lewis (*Lewis & Beecher*, attorneys), for respondent:

Urged, in addition to his points on appeal to the general term, that if the action had, in terms, been brought for a separation, the court might, in its discretion, under section 1766 of the Code, have granted the maintenance without a separation. But the discretion so to do was given by law to the court, and could not be controlled by the plaintiff's demand; that the case of Turrel v. Turrel (2 Johns. Ch. 391), was not in point, the sole object of the bill in that case being to secure to the plaintiff a legacy, against the wrongful efforts of the husband to deprive her of it; that in Davis v. Davis (75 N. Y. 221), it was not intended to hold, nor was it held, that an action for maintenance alone could be maintained.

DANFORTH, J.—The Code of Civil Procedure (Chap. 15), contains certain special provisions regulating matrimonial actions; and, among others, actions for a divorce

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or separation ; but it contains no provision which will sustain the case made by the plaintiff. By Art. 3, Chap. 15, *supra*, § 1762, it is declared, that an action may be maintained by a husband or wife against the other party to the marriage, to procure a judgment separating the parties from bed and board, forever, or for a limited time, for either of certain specified causes, all of which appear to exist in this case ; and § 1766 provides, where the action is brought by a wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require ; in particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties ; and it then provides, that the court may, in such an action, render a judgment compelling the defendant to make the provision specified in this case, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

The difficulty of the plaintiff's case is that the action brought by her is not such action as the statute authorizes. It is not an action to procure a judgment of separation. No separation is asked for, and it is apparent that the omission in this respect was intentional. The plaintiff seeks maintenance and support, nothing more ; and the learned counsel for the appellant says it was competent for her to ask relief in either form, and argues that, "if the court can grant maintenance apart from other relief, then the plaintiff may properly have that alone, and to pray for relief which is not really sought is not merely a formal absurdity, but it is misleading to the defendant."

The answer, however, is that the action is a statutory one ; and, if prosecuted, must conform to the terms

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upon which it is permitted. The discretion which may withhold one kind of relief and grant the other, is confided to the court, and its exercise in judicial proceedings cannot be limited by the plaintiff. The legislature has prescribed the nature of the relief to be sought, and only when that is apparent from the complaint, can the court, having jurisdiction, grant less than the plaintiff asks for, but has no power to do that where the object sought is not that named in the statute.

The cases referred to by the appellant are not to the contrary. In *Davis v. Davis* (75 N. Y. 221), a remark is made which, taken by itself, implies that a plaintiff may waive a decree for separation, although entitled to it; and the appellant supposes she may so elect at the beginning, as well as at the close of the case. But neither the text, nor the decision rendered, warrants that construction. A decree for maintenance was before the court, and was reversed upon the ground that, as a cause for separation was not established, the court had no power to make provision for the wife's support, and the suggestion now relied upon was made as a possible effect of the statute then under consideration. But the question was not before the court, and the possible volition of the wife was mentioned as one of the circumstances upon which the court might, in a different case, exercise its discretion.

In *Turrel v. Turrel & Jones* (2 Johns. Ch. 891), the case presented was under the act of 1813 (§ 10 of Chap. 102 [See 2 R. L. (Revision of 1813) 200]), authorizing the filing of a bill by a wife, specifying therein particularly, the circumstances on which she relies, and praying such relief as she may think herself entitled to. And it is plain that the only object of the bill was to have certain money given to the wife by her father, and which was then in the hands of the defendant Jones, as his executor, secured as a separate provision for the wife, and it

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appeared that the husband had threatened that when he obtained possession of such money he would not appropriate any part of it toward her maintenance. But the statute before us, as we have seen, declares the object of the action which the wife may bring, and the court has no jurisdiction to depart from it.

In *Atwater v. Atwater* (36 *How.* 431, S. C. 53 *Barb.* 621), the general term held that the statute did not authorize a complaint to be filed by a wife for her support and maintenance by her husband, as a distinct substantive relief. This was, we think, the true construction of the statute then in question, and the one now before us must be dealt with in the same manner.

Without considering, therefore, whether the residence of the plaintiff has been sufficient to give the court jurisdiction, we think the order appealed from was proper and should be affirmed, but without costs.

All concurred.

APPLEBY *v.* APPLEBY.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM;
MARCH, 1883.

§ 1762.

Action for separation.—What will not constitute abandonment.—When aid of court can be invoked for a separation.—What is not ground for judicial separation.—Minor domestic differences between husband and wife not within the province of judicial adjustment.

Where a wife declined to live with her husband except in her father's house, and the husband had requested her to leave such house, and had offered her support and a home, which she declined to accept,—*Held*, in an action by the wife for a separation, that the husband was under no legal obligation to reside with his wife in her father's house, and that it was not abandonment for him to reside elsewhere.

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For a father to insist upon the right to name his children, even if the insistence be unreasonable, is no ground for judicial interference; and the aid of the court can be invoked only where a right has been violated or a wrong is sought to be redressed. That husband and wife cannot live together in harmony is no ground for a judicial separation; their minor domestic differences are not within the province of judicial adjustment, and should be relegated where they belong—to the forum of mutual forbearance and social propriety.

Motion by defendant, the husband, to dismiss the complaint, in an action for separation, on the trial before the court at special term.

The complaint averred cruel and inhuman treatment, based upon alleged threats of personal violence and abusive language, abandonment and neglect to provide for the support of the plaintiff; and prayed for the separation of the parties, forever, for separate maintenance and for custody of the children of the marriage.

The other facts are sufficiently stated in the opinion.

Thomas B. Odell, for motion.

Starr & Ruggles, opposed.

LARREMORE, J.—It is scarcely conceivable that persons of assured social position, like the parties to this action, should, upon such slight provocation, invite notoriety and public criticism in matters affecting their domestic relations. There is nothing in the evidence to justify this action.

No proof was offered of any act of cruelty or unkind treatment on the part of the husband. His insistence upon his right to name his own children, even if unreasonable, is not the subject of judicial interference. Courts were not instituted to regulate and control all the minor differences of the domestic relations.

Such aid is only invoked when a right has been violated or a wrong is sought to be redressed.

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The question here to be decided is the abandonment of the plaintiff by the defendant. (§ 1762, *subd.* 3, *Code of Civ. Pro.*)

In the interview of October 10, 1881, with plaintiff's father, the defendant expressed his intention to make provision for the support of his family by a stated sum of money. He asked her to leave her father's house and offered her another home, which she declined to accept, and said, "she did not care to live with me (defendant) any longer."

After their separation, the defendant renewed his offer of support, by correspondence with plaintiff's father and his attorney. No response was made to this offer.

The case rests upon the testimony of plaintiff's father and that of the defendant. The plaintiff was not examined in her own behalf, and it must, therefore, be assumed that the statements of the defendant as to the conversations between his wife and himself are true.

She declined to live with him except in her father's house. He was under no legal obligation to remain there. That they could not live in harmony is no ground for legal separation, *Davis v. Davis*, 1 *Hun*, 444.

Difficulties of this character are not within the province of legal adjustment; they should be relegated where they belong—to the forum of mutual forbearance and social propriety.

The complaint should be dismissed, but without costs.

Bernard v. Morrison.

BERNARD, RESPONDENT, v. MORRISON,
APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
JANUARY, 1883.

§§ 487, 488, 498.

Election of answer or demurrer. — *Although same cause of action cannot be both demurred to and answered, under what circumstances election should not be compelled.* — *What averment in answer does not amount to a demurrer.*

Where the amended complaint contained one cause of action, and the paper served as an answer contained various affirmative defenses and denials, and stated, in conclusion, that "as a further and distinct defense to the matter set forth in the amended complaint, the defendant avers, that it does not state facts sufficient to constitute a cause of action;" and, at special term, on motion of the plaintiff, the defendant was compelled to elect whether he would abide by the paper served, as an answer or as a demurrer.—*Held,* reversing the special term, that although it was a perfectly well settled principle of pleading that the same cause of action could not be both demurred to and answered, in the same pleading, it was error to regard the paper served as being both an answer and a demurrer, and to have compelled such election. That the above quoted clause of the pleading, although setting forth a ground of demurrer, might, or might not, constitute a demurrer according to the connection in which it was used with other matter. When appearing with denials and affirmative defenses, it amounted to no more than an unnecessary notice that, on the trial, the defendant would move for a dismissal of the complaint on the ground of such failure to state a cause of action; and that the said clause professing to be an answer only, and not having the formal parts of a demurrer, it only amounted to a statement of the existence of a cause for which a demurrer might have been interposed.

3 *McC. Civ. Pro. R.* 218, reversed.

Spellman v. Weider (5 *How.* 5); Howard v. Michigan S. R. R. Co. (5 *How.* 206) [S. C., 8 *Code R.* 213]; Slack v. Heath (4 *E. D. Smith*, 95 [S. C., 1 *Abb.* 331]), limited.

(DANIELS, J., dissenting.)
(Decided March 20, 1883.)

Bernard v. Morrison.

Appeal by defendant from an order of the special term, compelling him to elect whether he would abide by a paper served as an answer, as an answer or as a demurrer. (Reported below, 2 *McC. Civ. Pro. R.* 213, and here reversed.)

The theory of the plaintiff in respect to the clause in question was, that the complaint, in describing certain acts, of third persons as having been done as partnership acts, omitted to show the membership and consent of one of the partners; that the objection not appearing upon the face of the complaint, and being one which would defeat the plaintiff's recovery, it was competent for the defendant, under § 498, to set forth such insufficiency as an objection; that the clause was a mere averment of a defense, and not a demurrer, and was framed in the language of § 488, subd. 8, as being a convenient form for expressing the defendant's objection.

The other facts are stated in the report below, *ante p. 213.*

John Graham (Geo. Owen, attorney), for appellant.

E. J. Myers (A. H. Nones, attorney), for respondent.

By the Court.—MACOMBER, J.—It was a mistake for the learned judge, at special term, to regard the pleading served by the defendant as both an answer and a demurrer. The clause therein, "that the complaint does not state facts sufficient to constitute a cause of action," though a ground of demurrer, may, or may not, be a demurrer, according to the connection in which it is used with other matters. When appearing with denials and with affirmative defenses, in an answer, it is no more than a notice, quite unnecessary to be sure, that at the trial the defendant will move for a dismissal of the complaint on that ground.

There are some decisions at special term of this court,

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pronounced at quite an early day under the Code of Procedure (*Spellman v. Weider*, 5 *How.* 5; *Howard v. Michigan So. R. R. Co.*, *Id.* 206), and, also, in the Common Pleas (*Slack v. Heath*, 4 *E. D. Smith*, 95), which seem to support the decision; but they cannot be deemed to be more than the statement of the now perfectly well recognized principle of pleading under the Code, that the same cause of action cannot be both demurred and answered unto, in the same pleading. In this case, however, the clause does not profess to be a demurrer, but professes to be an answer only; it has none of the formal parts of a demurrer, but only a statement of a cause for which a demurrer might have been interposed.

The order should be reversed, with costs.

DAVIS, P. J., concurred.

DANIELS, J. — (*dissenting*) My construction of the pleading is, that it was, in substance and effect, both a demurrer and an answer; and, for that reason, the order was right, directing the defendant to elect upon which he would stand. I, therefore, disagree with the conclusion of Mr. Justice MACOMBER, and think the order should be affirmed.

Williamson *v.* Williamson.

WILLIAMSON *v.* WILLIAMSON.

**SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM ;
FEBRUARY, 1883.**

§ 439.

Service by publication.—On what order for must be founded. — Complaint sworn to before commissioner of this State appointed for another State, but not accompanied by certificate of Secretary of this State, is not a verified complaint on which to found such order. — Such complaint confers no jurisdiction.

Under § 439 of the Code, an order for service by publication must be founded upon a verified complaint showing a sufficient cause of action against the defendant to be so served, etc. And a complaint which has been sworn to before a commissioner of this State appointed for another State, but which is not accompanied by a certificate of the Secretary of this State, as required by Laws of 1850, Chap. 270, § 4, does not furnish evidence of a verified complaint showing a sufficient cause of action against the defendant, and no jurisdiction is acquired to grant an order for such service, because of the want of a verified complaint.

Motion by defendant to vacate and set aside an order for service by publication, and the service of the summons effected under such order.

The facts are sufficiently stated in the opinion.

C. H. Smith, for motion.

A. Furber, opposed.

LAWRENCE, J. — This is an action to obtain a judgment for an absolute divorce, on the ground of the adultery of the defendant. The plaintiff resides in the city of New York, and alleges, in his affidavit, that the defendant "is at present living with her infant child in the said city of Baltimore, and State of Maryland ; that for the reason that defendant has not been within the

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State of New York for a period long prior to the commencement of this action, deponent has been unable to cause personal service of the summons herein to be made on defendant," etc. Upon the complaint and affidavit of the plaintiff, an order was made on the 5th day of September, 1882, for the service of the summons upon the defendant, by publication, and the defendant having made default, the cause was referred to a referee, who reported in favor of the plaintiff, but said report has not yet been confirmed. The defendant now moves to vacate and set aside the service of the summons and order of publication, for the reason that the complaint presented to the justice granting the order of publication was not a *verified* complaint, no certificate of the Secretary of State of the State of New York, certifying to the genuineness and official signature of the commissioner of the State of New York, residing in Philadelphia, where the complaint purports to have been verified, being attached to the alleged verification of the complaint; also on the ground that the affidavit and order for publication failed to specify defendant's precise address in Baltimore, to which the summons should have been mailed. There is also in the notice of motion a general prayer that, in case the application be denied on the above grounds, the default of the defendant be opened, and that she be allowed to come in and defend the action.

In this case, the order for the publication of the summons was founded upon a complaint purporting to have been verified before Lewin W. Barringer, a commissioner of the State of New York, resident in Philadelphia, Pennsylvania. By § 439 of the Code of Civil Procedure, the order for the publication of the summons *must be founded upon a verified complaint*, showing a sufficient cause of action against the defendant, to be served, and proof by affidavit of the additional facts required by § 438. It is claimed that, in this case, no verified com-

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plaint was presented to the learned justice who granted the order of publication, for the reason that there was not attached to the certificate of the commissioner in Philadelphia, a certificate of the Secretary of State certifying that such commissioner was duly authorized to administer such oath or affirmation, etc. I am inclined to the opinion that this objection is well taken, for the reason that the statutes provide, that when any oath or affirmation shall be taken before any commissioner appointed in another State, for this State, *before the same shall be entitled to be used or read in evidence, there shall be subjoined or affixed to the certificate signed and sealed by such commissioner, a certificate under the hand and official seal of the Secretary of State of this State, certifying that such commissioner was duly authorized to administer such oath or affirmation* at the time his certificate bears date, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner, deposited in his office, and that he believes the signature and the impression of the seal of said certificate to be genuine. (See 3 R. S. [7th ed.] 2231, § 2; [Laws 1875, Chap. 136,* § 2]; *Id.* 2226, § 4; [Laws 1850, Chap. 270, § 4.]). Inasmuch as the statute requires that before any deed or other instrument, oath or affidavit, patent or record, shall be read in evidence, the certificate of the Secretary of State required by the statute shall be attached to the certificate of the commissioner residing in the sister State, it seems to me conclusively to follow, that there was *no evidence* before the learned justice who granted the order of publication, in this case, that there was a *verified complaint* showing a sufficient or any

* The provisions of Chap. 136, Laws 1875, seem to be confined to commissioners of the State appointed in foreign States and countries.

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cause of action against the defendant. And yet, as we have already seen, section 439 of the Code requires that the order *must* be founded upon a *verified* complaint, showing such sufficient cause of action. If the view which I take is correct, the learned justice who made the order for the publication of the summons never acquired any jurisdiction to make the order, the essential prerequisite to such jurisdiction, to wit, a verified complaint, being wanting in the case presented to him.

**PLIMPTON AND ANO., APPELLANTS, v. BIGELOW,
RESPONDENT.***

**SUPREME COURT, FIRST DEPARTMENT; GENERAL TERM,
JANUARY, 1883.**

§§ 413, 641, 647, 649, 3343.

Levy under warrant of attachment.—When stock in a foreign corporation, located in this State, belonging to a defendant, may be levied upon.—Application of § 647 not restricted to corporations organized under the laws of this State.—How Code discriminates between domestic and foreign corporations.—The objection that an action is barred by the statute of limitations can be taken by answer only.—Duty of courts to follow and enforce statute law.—Rights of non-residents to sue in the courts of this State.

A foreign corporation, organized under the laws of another State, one of the objects of which is to transact business in the city of New York, and in which city its chief place of business and manufactory are situated, and wherein it carries on its general business, and where two out of its three directors reside, is located within the county of New York; and the shares of a defendant in such corporation may be levied upon under a warrant of attachment, although neither the defendant nor the certificates of his stock are within the State. [**] (DAVIS, P. J.,

*An appeal by the respondent to the court of appeals is pending.

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regarded the right to attach such stock as not free from doubt, but deemed it proper to solve the doubt in favor of the plaintiffs; and concurred upon the ground that, in such a case, the corporation may be treated for all practical purposes as though it were a domestic corporation, and the stock thereof might properly be regarded as in this State, so as to be attachable by a creditor of the owner.) ["]

The application of section 647 is not limited to corporations formed under the laws of this State, and the only requirements in order to make an effectual levy upon stock in any corporation, under a warrant of attachment, are, that, through business operations, the corporate property should be within the county of the sheriff who executes the warrant, and that the levy be made according to subdivision 8 of section 649. ["."]

When the Code designs to discriminate between domestic and foreign corporations it designates the particular corporation as either "domestic" or "foreign;" and when there is no such designation, and the language of the provision is appropriate, it will be presumed that it was intended to include all corporations. ["."]

The objection that it appears that the action, wherein a warrant of attachment has been granted, was not commenced within the time limited by law, will not justify an order vacating a levy made according to such warrant. Under section 418, which is clearly imperative, such objection can be taken by answer only. ["]

Where the law upon a given subject has been plainly declared by the legislature, the duty of the courts is to follow and enforce it, although it may not be in strict accord with the views expressed upon the same subject by the courts of another State. ["]

Non-residents may institute suits in the courts of this State, and avail themselves of all the remedies provided by the Code. ["] *Hibernia Nat. Bank v. Lacombe* (84 N. Y. 867) followed.

2 McC. Civ. Pro. R. 181, reversed.

Moore v. Gennett (2 Tenn. Ch. 875), *Steel v. Smith* (7 Watts & Serg. 447) and *Danforth v. Penny* (7 Metcalf, 564), distinguished.

(Decided March 20, 1888.)

Appeal by plaintiffs from an order of the special term vacating a levy under a warrant of attachment. (Reported below, *2 McC. Civ. Pro. R.* 181, and here reversed.)

In addition to the facts given in the report below and contained in the following opinion, it may be stated that the defendant appeared specially for the purposes of the motion ; and that, on this appeal, it was claimed that

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the notes upon which the action was brought were barred by the statute of limitations.

Edward D. Bettens (Bettens & Lilienthal), for appellants.

Simon Sterne (Sterne & Thompson), for respondent.

By the Court.—DANIELS, J.—The plaintiffs, who resided in the State of Massachusetts, brought this action to recover the amount unpaid upon promissory notes made by the defendant. The demands were such as were the proper subject of an attachment under the provisions of the Code, and the plaintiffs were entitled to institute their suit for the recovery of the amounts claimed, ['] in this court. And for the purpose of obtaining satisfaction, they could lawfully avail themselves of all the legal remedies provided by the Code for that purpose. (*Hibernia National Bank v. Lacombe*, 84 N. Y. 367, 385). Under this authority, they had a right to seize whatever property or interests the law of this State rendered the subject of attachment. And by virtue of its provisions, the sheriff, in form, levied upon the shares owned by the defendant in a corporation formed under the laws of the State of Pennsylvania, and known as the Hat Sweat Manufacturing Company. This seizure was set aside on motion of the defendant, for the reason that the shares were not deemed subject to the power or operation of the attachment. Whether this decision was correct, is the chief point in controversy upon ['] this appeal. Ordinarily, when neither the owner of the shares nor the corporation itself can be found within this State, the attempt to make a seizure of this nature would be entirely ineffectual. For the sheriff, in executing an attachment, can only seize the property of the debtor, which may be found in this county, and, where the owner of the shares, as well as the corpora-

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tion issuing them, resides and is located in another State, the shares themselves would not be within the county in which the attachment might be issued ; and, for that reason, would be incapable of being levied upon by means of it. But this was not a case of that description. For while the corporation was formed under the laws of the State of Pennsylvania, one of its objects was to transact business in the city of New York ; and, as a matter of fact, its chief place of business was there located, where it manufactured goods, made its business arrangements, paid its bills and carried on its general business, and two of its three directors were residents of the city of New York. For this purpose, its capital, to a very considerable extent, certainly must have been brought to this State and invested in such business ; and the profits to be derived by it, and from which the dividends would be made upon its stock, would, in that ["] manner, be obtained from this State. To that extent, it enjoyed all the rights and privileges of a domestic corporation, and placed itself, by its operations, within the county in which the plaintiffs' attachment was afterwards issued. So far as defendant was the owner of the shares of the corporation, he himself was interested through them in its capital and the business carried on by it (*Burrall v. Bushwick R. R. Co.*, 75 N. Y., 211). His stock, of which the certificates held by him were evidence of his title, was actually, therefore, within this State ; and, as such, should be subjected to the satisfaction of his obligations to his creditors. There could be no more reason for exempting his shares from those obligations than there would be if the corporation itself had been organized and existed under the laws of this State. For its business pursuits were carried on substantially the same as if this particular corporation had been created under its laws. There was clearly no substantial difference upon which the owner

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of such shares could claim immunity. The purpose and object of the corporation were the manufacture and sale of its fabrics, and that business is shown to have been confined to the city of New York. It was here carried on by the corporation through its officers and [?] agents. To that extent, it located itself in this city, as it was contemplated it might under its articles of incorporation, and it was, consequently, a corporation within this county.

The law has provided, in general language, that : "The rights or shares which the defendant has in the stock of an association or corporation, together with the interests and profits thereon, may be levied upon" * * * under an attachment (*Code of Civil Procedure*, § 647).

[?] This section has in no manner been confined in its effect to corporations formed under the laws of this State. It is, of course, to be construed with section 644, requiring the property to be levied upon to be within the county, and that is the only restraint to which this general enactment has been subjected. And the association or corporation whose shares may be so levied upon, may, as well, under this language, be one formed under the laws of another State, as though it was formed under the laws of this State. And that this section was intended to be so construed is evinced by the circum-

stance that when a discrimination is intended to be [?] made, the Code, by its provisions, has designated the particular corporation as either a domestic or foreign corporation. And care has been taken to preserve this distinction by a definition to that effect given in the Code itself (*Code of Civil Procedure*, § 3343, subd. 18). By this definition, what shall be known as a domestic corporation has been declared, and every other is [?] denominated a foreign corporation. Where no such discrimination as that has been made, and the language is appropriate for that purpose, it is, therefore, to

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be presumed, that it was intended to include all corporations; and the language employed in the section already referred to, is of that character. A provision of a like general nature was considered in *Southern Life Insurance, &c., Co. v. Packer* (17 N. Y., 51), and it was held to include corporations formed in other States as well as those created under the laws of this State, and no reason appears for distinguishing the present case from the principle of construction established by that authority.

The Code has prescribed the particular manner in which the shares of the defendant in a corporation may be seized, under an attachment, and that is the only other qualification to which the exercise of this authority has been subjected. To make such a seizure, a copy of the attachment, with notice showing the property attached, is to be left with the president or other head of the association or corporation, or secretary, cashier or managing agent thereof (*Code*, § 649, subd. 3).

[¶] Whenever the corporation, by means of its operations in business, may be within the county in which the attachment has been issued, and these requirements can be observed there, the Code has provided for the seizure of the shares owned in it by the defendant. This is all that has been provided for, to constitute a literal compliance with all the provisions made on this subject by the statute. When that may be done, it was clearly the intention of the law, that such shares might be effectively levied upon by means of the attachment.

It has been stated generally, in a recent work upon this subject, that the right to attach the shares of a defendant in a corporation is restricted to those corporations existing under the laws of the State in which the attachment may be issued (*Drake on Attachments* [5th ed.], § 244). This general statement of the law was

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made upon the authority of *Moore v. Gennett* (2 *Tenn. Ch.*, 375). And it was so generally considered in the opinion of the court. But the case was not determined upon that point, for it appeared that the interest of the defendant in the shares themselves was neither in fact, nor in form, levied upon under the attachment.

No lien upon, or title to, the shares could, therefore, be maintained; and, for that reason principally, the right and claim of the creditor were rejected. The inability of the creditor to attach the debtor's shares in a corporation created under the laws of another State, was maintained, so far as it was considered, substantially upon the authority of *Steel v. Smith* (7 *Watts & Serg.*, 447). But that is in no sense an authority upon this point. It was an action upon a judgment recovered in the State of Louisiana, where the suit was commenced by a seizure of the debtor's property, and this was held to create no personal liability against the debtor, upon which the action could be maintained. These authorities, consequently, do not maintain the general statement of the law made by this authority. It undoubtedly would be a correct statement of it, where neither the debtor himself, nor the corporation by which the stock was issued to him, is within the State when the attachment was issued. But such were not the facts of this case as they have been presented by the affidavits; for here the corporation had voluntarily placed itself within this State, where its active and principal business operations were transacted. The case of *Danforth v. Penny* (3 *Metcalf*, 564) is entitled to no broader application. For the statute under which it arose was so construed as to be intended to place corporations on the same footing, as to liability, as that of individuals, which had previously been held not to include the residents and inhabitants of any other State. It is no authority for limiting

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the provisions of the Code, so far as to exclude a case of the nature of that now before the court.

[¹⁰] What the law may be upon this subject is necessary for the legislature to declare, and when that declaration has been plainly made, it is the duty of the courts to follow and enforce it, even though it may not be in strict accord with the views expressed upon the same subject by the courts of a neighboring State. The legislative purpose as to attachment proceedings has been clearly defined by the provisions which have been made in this State, and, by them, the shares of a defendant in a corporation have been rendered the subject of seizure by virtue of an attachment, whenever the proceeding particularly specified can be taken and followed. This was a case of that description, for one of the resident directors of the corporation, whose shares were owned by the defendant, was its treasurer and secretary ; and, in the seizure of the shares, a copy of the attachment, together with a notice that those shares were levied upon, was served upon this officer ; and, to promote the proceedings, as he was required by the law to do, he made his certificate stating the number of shares owned by the defendant in this corporation. The terms as well as the spirit of the statute, were fully complied with ; and as the corporation carried on its business, and had the bulk of its property in this county, that was all which could be required for the lawful seizure of the shares under the attachment.

[¹¹] The fact that by the provisions of the statute prescribing the time within which an action for the collection of a debt may be instituted, may appear to have expired before this suit was commenced, will not justify the order from which the appeal has been taken ; for, by section 413 of the Code of Civil Procedure, this objection can only be taken by answer. This section is clearly imperative, and renders an examination of the

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authorities relied upon by the respondent, on this subject, unnecessary, at this time.

The case is an important one; and it is known as a matter of fact, that the learned judge by whom the order was directed, from which the appeal has been taken, entertained grave doubts as to its propriety. If it should be sustained in this instance, then every creditor, whether a resident or not a resident of the State, would be deprived, in cases of this description, of the power, through the intervention of its tribunals, to obtain satisfaction of their debts, simply because the corporation prosecuting its business enterprises within this State had elected to organize itself under the laws of another State. The distinction between this corporation and a corporation formed under the laws of this State, in view of the other facts made to appear, was simply nominal, and the consequence should be held legally to follow, that the debtor, profiting in the same manner by the operations of the corporation, as he would if it had been formed under the laws of this State, should not be exempt from the compulsory means provided by law for satisfying his debt. Such a distinction should not be made without some provision in the law indicating the necessity of its adoption. No such provision has been inserted in the Code as it now exists. But those which have been enacted plainly require a different view to be taken of their effect.

The order, for these reasons, should be reversed; and an order entered denying the motion made by defendant, but without costs.

[²⁷] DAVIS, P. J.—I concur on the ground that, for all practical purposes, the Hat Sweat Manufacturing Company may be treated, in this case, as though it were a domestic corporation. Though organized under the laws of Pennsylvania, yet its office, factory, business

White *v.* Angel.

and affairs are located and conducted in this State. Its stock may be properly deemed to be in this State, so that it may be attached here by a creditor of its owner. The question is not free from doubt, but it seems to me proper to solve the doubt in favor of the plaintiffs.

WHITE *v.* ANGEL.

COUNTY COURT OF ALLEGANY COUNTY ; JUNE, 1883.

§§ 772, 775, 781.

Extension of time to plead.—Order for, exceeding twenty days, is not an order staying proceedings.—Can be granted ex parte by county judge, in action pending in supreme court.—What should be the ruling under section 775.

An order extending time to answer beyond the period of twenty days is not an order to "stay proceedings" in the action; and, in an action pending in the supreme court, the county judge may grant an order so extending the time, upon an *ex parte* application.

Section 775 of the Code of Civil Procedure is a re-enactment of subdivision 6 of section 401 of the Code of Procedure, and the ruling under the re-enactment must be the same as under the old provision.

Sisson *v.* Lawrence (25 *How.* 483 [S. C., 16 *Abb.* 259, note]), followed.

Ex parte motion by plaintiff, in an action pending in the supreme court, to vacate an order of the county judge, extending the defendant's time to answer, beyond the period of twenty days.

The facts are sufficiently stated in the opinion.

A. A. White, for motion.

FARNUM, County Judge.—On June twenty third, I granted an *ex parte* order on the usual affidavit, giving the defendant until July twentieth in which to make and serve his answer in this action.

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The defendant now moves upon the papers to vacate the order, and contends that the county judge had no power to grant an extension beyond the period of twenty days, and cites section 775 of the Code of Civil Procedure for his authority.

It is clear that, if this is an order to "stay proceedings," there was no power in the county judge to grant it for a longer time than twenty days.

I do not consider that an order extending the time to answer is an order to stay proceedings. Sisson v. Lawrence (25 How. 435) is a complete answer to this claim. That case was decided under section 401 of the Code of Procedure, subdivision 6. Section 775 of the Code of Civil Procedure re-enacts that subdivision, and the ruling must be the same under the new section as under the old one.

The motion is denied.

BENGTSON v. THINGVALLA STEAMSHIP CO.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY
CIRCUIT; APRIL, 1883.

§ 1776.

Rule of pleading when corporate existence is to be put in issue. — When plaintiff not bound to prove corporate existence of defendant. —

What is necessary to constitute an affirmative allegation. — What is not such an allegation.

Where the complaint alleges the incorporation of the defendant, the plaintiff, under section 1776, is not bound to prove the corporate existence of the defendant, unless the verified answer contains an affirmative allegation that the defendant is not a corporation.

To affirm is to assert positively, to declare the existence of something, and an affirmative allegation is a positive allegation.

Where the verified answer set forth, "For a second and separate defense,

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the defendant alleges, on information and belief, that it is not, and never was, a corporation,"—*Held*, that this was not an affirmative allegation, that it neither denied nor affirmed, and that it did not put in issue the corporate existence of the defendant.

Of all persons, the defendant's officers should know whether or not the defendant is a corporation; and the salutary rule of pleading is, that the party intending to raise the issue as to incorporation should be held to a positive allegation to such effect; at least this should be the rule where a company has held itself out to the world as a corporation, and would then deny its corporate existence.

The reasoning of *East River Bank v. Rogers* (7 *Brown*, 498), applies with greater force where the answer is by a corporation.

Motion by defendant to set aside a verdict in favor of the plaintiff and for a new trial upon the minutes, on the ground that the plaintiff had failed, on the trial, to prove the corporate existence of the defendant.

The action was brought to recover for the loss of the plaintiff's baggage, and the complaint alleged that the defendant, a common carrier, was a foreign corporation existing under the laws of the Kingdom of Denmark. The verified answer denied the corporate existence, in the manner stated in the opinion. On the trial, the plaintiff was sustained in the claim that the answer was not sufficient, under § 1776, to compel proof of the defendant's incorporation.

Hill, Wing & Shoudy, for defendant and motion.

J. Edward Swanstrom, for plaintiff, opposed.

BROWN, J.—The plaintiff was not bound to prove the incorporation of the defendant, unless a verified answer was served, containing an affirmative allegation that the defendant is not a corporation. The answer contains an allegation as follows: "For a second and separate defense, the defendant alleges, on information and belief, that it is not, and never was, a corporation." I do not think this allegation puts in issue the incorporation of

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the defendant. It is not an affirmative allegation. To affirm is to assert positively ; to declare the existence of something. An affirmative allegation is a positive allegation. The allegation in the answer is nothing. It neither affirms nor denies. Of all persons, the defendant's officers should know whether it is an incorporation or not. In the case of the *East River Bank v. Rogers* (7 *Bosw.* 493), an answer by the defendant, "that he is informed and believes the plaintiffs are not an incorporation," was held not to amount to a plea "that the plaintiffs are not a corporation." The reasoning of that case applies with greater force to an answer by the corporation itself. The rule of pleading is a salutary one, and the party intending to raise the issue as to the corporation should be held to a positive allegation to that effect ; at least such should be the rule where a company, holding itself out to the world as a corporation, denies its own existence.

Motion for a new trial denied, with costs.

Muser v. Miller.

MUSER ET AL. v. MILLER AND ANO.

N. Y. SUPERIOR COURT, SPECIAL TERM; JUNE, 1883.

§§ 450, 553.

Actions against married women. — *For what torts an order of arrest will lie against a married woman.* — *Joinder of the husband with the wife in actions for the torts of the wife.* — *Husband need not be joined with wife in actions for the torts of the wife in relation to her separate estate.* —

Common law rule in regard to joinder of husband in actions for torts of wife. — *What may constitute an injury to property.* — *Reduction of bail on order of arrest.*

A married woman carrying on a business upon her separate account is liable to arrest in an action to recover damages for a willful injury to property, done in the management of her business.* [^{1,2}]

In all cases of torts, as well as contracts, affecting the separate property of a married woman, or connected with, or arising from, the management or control of her business, the reason of the common law rule in relation to the joinder of the husband with the wife, in actions for the torts of the wife, has wholly ceased to exist, and the rule itself has been abrogated. [¹] The exemption of a married woman from arrest, in such an action, has, therefore, ceased in all cases wherein the law has expressly authorized, in general terms, the arrest of females; and section 553 of the Code gives the right of arrest during the pendency of the action against *any* woman, in an action to recover damages for a willful injury to the person, character, or property. [¹]

* People ex. rel. Miller v. Davidson, sheriff, §§ 558, 2088.

On the trial of this action, the plaintiffs recovered judgment for \$19,500. Thereafter, in July, 1883, and before any execution had been issued, the defendant Julia Miller sought, in the supreme court, first department, to obtain her release through *habeas corpus* proceedings, on the ground that being a married woman an order of arrest would not lie against her, and that she was therefore illegally restrained of her liberty. At the hearing, VAN VORST, J., sitting at chambers, said: "After consideration, I reach the same conclusion as that to which Justice FREEDMAN arrived when the motion was pending before him in the superior court to vacate the order of arrest. He denied that motion, and accompanied his decision with an opinion in the correctness of which I entirely concur. I can add nothing to it. For the same reasons which led to the denial of the motion, the writ of *habeas corpus* must be dismissed and the prisoner remanded."

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The reason of the common law rule in regard to the joinder of the husband with the wife in actions for the torts of the wife, stated and explained [7]; and the rule itself held to have been changed by statute, at least so far as relates to torts committed by the wife in connection with her separate property.* [4, 5, 6, 7]

At common law and before the Code of Civil Procedure, a married woman could not be held to bail in an action founded upon her personal tort, though the husband might be so held, and required to furnish bail both for himself and his wife. [7]

What may constitute an injury to property, stated. [7]

Under what circumstances the amount of bail required by an order of arrest will not be reduced. [7]

Motion by defendant Julia Miller to vacate an order of arrest or for a reduction of bail.

The defendant Julia Miller was a married woman carrying on business upon her separate account, as a dealer in laces. The action was brought to recover the sum of \$24,819 damages, the value of certain laces stolen from the plaintiffs, and alleged to have been purchased by the defendant Julia Miller, from the parties engaged in the theft, knowing the goods to have been stolen. The defendant Julia Miller was held to bail in the sum of \$25,000 under an order of arrest, and was actually confined.

The further facts are sufficiently stated in the opinion.

Charles S. Spencer & James L. Robinson, for motion.

D. M. Porter & James M. Smith, opposed.

* Although Fitzgerald v. Quann (1 Civ. Pro. R. [1 McCarty] 278), is referred to by FREEDMAN, J., it should be observed that Muser v. Miller, *supra*, does not go to the extent of holding that the husband must not be joined with the wife in actions for the *mere personal* torts of the wife; that the husband should be joined in such actions, see Hoffman v. Lachman, 1 Civ. Pro. R (1 McCarty) 278, note; Berrien v. Steele, *Id.* 279, note; Fitzsimmons v. Harrington, *Id.* 380 (disapproving Fitzgerald v. Quann, *supra*); Trebing v. Vetter, 2 McC. Civ. Pro. R. 391, (approving Fitzsimmons v. Harrington, *supra*).

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FREEDMAN, J.—The plaintiffs have made out a *prima facie* case against the defendant Julia Miller, which has not been overcome by the proofs adduced by her, to such a degree that I can determine the merits. The testimony of James J. Madden, the thief, and Fannie Lewis, the receiver, is corroborated in several particulars, and especially by the circumstance that some of the stolen goods have been shown beyond controversy to have been in the possession of the defendant. Her statement, by affidavit, that she paid a fair value for the goods she did purchase from the receiver, cannot overcome the case made against her, because from the fact that she was a dealer in laces since 1877, and a purchaser from leading merchants in New York, and had even received goods on consignment from the plaintiffs in this action, the inference may be drawn that her statement is not true, and that she knew at the time that she was getting the goods very much below their intrinsic as well as market value. Without going into particulars, it is sufficient to say that much of what the defendant shows may be true, and yet a *prima facie* case remains against her, that she committed at least a willful injury to plaintiffs'

property within the meaning of section 558 of the [1] Code of Civil Procedure. By the affirmance of the court of appeals (64 N. Y. 625) of Duncan *v.* Katen 6 Hun, 1), it is now settled that, in such a case, a willful injury to property does not mean an injury merely to the thing itself, but an injury to the owner's right in and to the thing.

The case at bar, therefore, falls within that class of cases in which the rule prevails that the court will not try the merits upon affidavits. This being so, the order of arrest cannot be vacated unless the defendant's point is well taken, that because she is a married woman no order of arrest will lie against her under any circumstances.

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[1] At common law, a married woman could not be held to bail in an action founded upon her personal tort, though the husband might be held and might be compelled to give bail for both (*Grah. Pr.* 127; *Anony-*
mous, 1 Duer, 613; *Schaus v. Putscher,* 16 *Abb. Pr.*
353, note). That the Code in force before the Code of Civil Procedure did not change the rule upon this point was distinctly held in *Solomon v. Waas* (2 *Hilt.* 179).

[1] The necessity for holding the husband arose from the legal effect of the marriage relation. At common law, the husband and wife by marriage became one person, in law, that is, the very being, or legal existence, of the woman was suspended during the marriage, and incorporated or consolidated into that of the husband. But the necessity for such joinder was not, strictly speaking, because the husband was absolutely liable, but it grew out of the fact that a suit could not be maintained against a wife alone during coverture (2 *Bishop on Married Women*, § 254).

[1] Under the statutes of this State, any married woman may take and hold real as well as personal property, separate and apart from her husband, and enjoy the same, and the rents, issues and profits thereof, in the same manner as if she were a single female; and she has express authority to bargain, sell, assign and transfer her separate personal property, to carry on any trade or business, and perform any labor or services on her sole and separate account. The power thus conferred to carry on a trade or business includes the ability to make bargains and contracts in relation to it, in almost any mode known to the law, and in accordance with the practice of the commercial community, and such bargains and contracts have been held valid against her, notwithstanding her coverture, provided they were made in the course of her trade or business, and as an incident to it. Upon any such bargain or contract, she

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could, since 1860, sue and be sued in the same manner as if she were sole, and the same may be said generally concerning all matters having relation to her sole and separate property.

[¶] It was held, however, that these changes by statute did not alter the common law liability of the husband for the mere personal torts of the wife, but that the rule was changed only in cases of torts committed in the management and control of her separate property (*Baum v. Mullen*, 47 N. Y. 577; *Kowing v. Manly*, 49 N. Y. 192). But even then the husband was held, in some cases, to be still a necessary party to the action.

[¶] Thus the rule as to the necessity of the joinder of the husband with the wife, in a case of tort committed by the wife, remained until the enactment of the Code of Civil Procedure. Section 450, as originally enacted, read: "In an action * * * a married woman appears, prosecutes, or defends, alone * * * as if she was single." In his notes, Mr. Throop says that that section was intended to sweep away all distinctions between a *feme sole* and *feme covert*, in respect to suing and being sued, and in *Janinski v. Heidelberg* (21 Hun, 439), it was held by the general term of the supreme court, that the language used was comprehensive enough to do it.

[¶] In 1879 section 450 was amended by adding at the end thereof the further express provision that in any action or special proceeding affecting the separate property of a married woman, it is not necessary or proper to join her husband with her as a party.

Since that amendment it was held, in *Fitzgerald v. Quann* (1 Civ. Pro. R., [by George D. McCarty,] 273), that it is now no longer necessary or proper to join the husband as a defendant in an action against the wife for her personal tort, though such tort was wholly uncon-

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nected with the wife's separate estate or the management or control of her business, and that the reason of the rule in regard to the joinder had wholly ceased to exist.

[¶] For the purpose of determining the motion before me, it is not necessary to go quite as far. It is sufficient to hold, that the reason of the rule in regard to the joinder has wholly ceased to exist, and the rule itself has been abrogated in all cases of torts, as well as contracts, affecting the separate property of a married woman, or connected with, or arising from, the management or control of her business. For it is conceded that the wrongful acts complained of in the case at bar were committed in the course of the defendant's business [¶] as a dealer in laces. It follows, then, that, if to the extent stated the reason of the rule has ceased to exist and the rule itself has been abrogated, the exemption of a married woman from arrest, which sprang solely from the reason of the rule, must cease, whenever the rule ceases, in all cases in which the law expressly authorizes the arrest of females in general terms. In looking for such authority, it will be found that section 553 of the Code of Civil Procedure gives the right of arrest during the pendency of the action against *any* woman in an action to recover damages for a willful injury to person, character or property.

[¶] Having already shown that the case made out against the defendant is one which falls within the class of cases specified in section 553, and it appearing that the wrongful acts charged against the defendant were committed by her in the management of her business, she is not entitled to have the order of arrest vacated for the sole reason that she is a married woman.

From the examination so far made, it appears that no ground whatever exists for the vacation of the order.

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[¹¹] As to reducing the bail, I have also failed to discover any ground upon which the defendant can be relieved. According to some of the testimony, the defendant had all the goods which were stolen from the plaintiffs, and if the jury should, under all the circumstances, find such testimony worthy of belief, their verdict will be for an amount which, with interest and costs, will exceed the amount of bail specified in the order. In view of such contingency, the plaintiffs have a right to have the bail maintained as originally fixed.

The only relief I can grant is to order an immediate trial of the issue by jury, on the ground of the actual imprisonment of the defendant. If she so elects, her case may be set down for trial for Wednesday of this week, with a preference on the day calendar.

Motion to vacate order of arrest denied, with \$10 costs.
Order to be settled on notice.

LEWIS, RESPONDENT, v. STEVENS, APPELLANT.

COURT OF APPEALS; JUNE, 1883.

§§ 580, 581, 724.

Allowance of bail upon order of arrest. — When cannot be set aside. — Sheriff exonerated from liability by allowance of bail. — When liability of, cannot be revived. — Position and rights of sheriff as bail.

When bail has been allowed upon regular notice, such allowance cannot be set aside on account of the excusable default of the plaintiff's attorney at the justification.

When bail has been regularly allowed, the sheriff is thereupon exonerated from liability; and having been once discharged, the court has no power to renew his liability.

Upon an order of arrest, the sheriff occupies the position of a surety, and his rights are *strictissimi juris*; and, being once discharged, his liability cannot be revived against his objection.

Lewis v. Stevens (48 N. Y. Super. 559, memorandum,), reversed.
(Decided June 12, 1883.)

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Appeals by the defendant and the sheriff of the county of New York, from an order of the general term, N. Y. superior court, reversing an order of the special term denying a motion on the part of the plaintiff to open his default taken upon the justification of bail given to discharge the defendant from an order of arrest. (Memorandum below, 48 N. Y. Super. 559, and here reversed.)

The defendant was arrested by the sheriff under authority of an order of arrest. To the bail which was given by the defendant, the plaintiff excepted, and the defendant duly served a notice of justification, for July 31, 1882, at 11 o'clock, A. M. At the time thus fixed, the plaintiff's attorney did not appear, nor was he represented; and, on his default, the bail bond was regularly approved and filed. Thereafter, the plaintiff's attorney moved to open such default, and that the approval of the bond be set aside, and the sureties be required to appear and submit to an examination by him, at a time to be fixed by the court. The plaintiff's attorney sought to excuse his default, upon the ground that on Saturday, July twenty-ninth, he left the city, intending to return by 11 o'clock, A. M. on July thirty-first; but that the train upon which he took his return passage, and which was advertised to reach the city by 11 o'clock A. M., was greatly delayed, and did not arrive until 12.30 o'clock P. M.; that through the carelessness of those in charge of his office, no one, on his behalf, attended the justification. The plaintiff's motion was denied at special term, but on his appeal to the general term, the order of the special term denying the motion was reversed, and the default opened, on terms, and the examination granted upon three days' notice.

Malcolm Graham (Chas. F. MacLean, attorney), for the appellant, Bowe, sheriff:

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A. J. Dittenhoefer (*I. Albert Englehart*, attorney), for the appellant, Stevens :

The appellants claim that the allowance of bail being regular and untainted with fraud, the court had no power to set it aside, no matter how good the excuse for the plaintiff's default might be.

The control of the court over the justification of sureties is very limited ; and, even when the plaintiff appears, an adjournment can be had only to the next judicial day. *Code*, § 580. The plaintiff now seeks to do indirectly that which he could not do directly — that, without the consent of the parties, the sureties justify upon such a day as the court may appoint.

Independent of some statute, there is no power in the court to permit an examination of the sureties after an allowance has been granted ; and an omission to appear at the proper time cannot be relieved against. *Petersdorff on Bail* [10 Law Library, 176], 318 ; *Butler's Bail*, 1 Chitty R. 83. The excepting party is the actor, and it is not necessary to take any step, except upon his requisition. *Ballard v. Ballard*, 18 N. Y. 491. The reason of the rule is manifest. The sheriff has no means of knowing the cause of the plaintiff's absence, and upon the allowance of bail, the defendant is wholly in the hands of the sureties, and if they should permit the defendant to depart the jurisdiction, as they might do, it would be unjust to the sheriff to cast upon him the burden of producing the defendant, when he had been enlarged by the due course of law. .

It is well settled, that the justification of bail discharges the sheriff, and his authority to retake the defendant vanishes the moment bail is allowed. The remedy given by section 589 is then gone. The liability of the sheriff cannot be made and unmade in the discretion of the court ; and when he has once been discharged, there is, in the absence of some positive

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statute, no power to restore the liability. The case of *Zimm v. Ritterman* (5 Rob. 618), is really in favor of the appellants.

The severity of the statute as against a sheriff is shown by the case of *Arteaga v. Conner* (88 N. Y. 403), and that severity should not be extended, nor the statute stretched, in order to create a liability in him as bail. The sheriff should be as much protected against the plaintiff by the allowance of bail as he is against the defendant by an order of arrest, and it is to so protect him that the provisions of section 581 were enacted.

Henry D. Hotchkiss, for respondent:

The plaintiff presented a strong case for the indulgence of the court, and it was not pretended by the defendant that the sureties would suffer any loss or inconvenience by being compelled to attend court for a second time.

The court had the power to open the allowance of bail, without regard to the sheriff. *Gould v. Berry*, 1 *Chitty R.* 143; *Brown v. Gillies*, *Id.* 372. Formerly, provision was made for an appeal from an allowance of bail. *Rule 12, Supreme Court Rules of 1848.*

The rights which a sheriff has as bail are by no means paramount to those of the parties to the action; and, although his rights are well recognized, they may be more or less affected by the exercise of the discretionary power of the court, in according to the parties an extension of time, opening defaults, etc. In such cases, where the interests of the sheriff may be affected, he should be allowed an opportunity to be heard; but having been heard, and the discretion of the general term having been rightly exercised upon the merits, the sheriff can go no further.

The defendant would suffer no hardship for he could not be taken into custody again, until bail had failed to justify. *Arteaga v. Conner*, 88 N. Y. 403.

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RUGER, Ch. J. — This is an appeal from an order of the general term, reversing an order of the special term denying a motion to open a default taken upon a hearing for the justification of bail upon an arrest in the action.

The defendant and sheriff each had notice of the motion, each appeared in opposition thereto, and each appeals from the decision of the general term.

It is provided by section 580 of the Code of Civil Procedure that, for the purposes of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath touching his sufficiency. It is further provided that the judge may adjourn the examination from day to day, in his discretion, until it is completed; but such adjournment is required to be to the next judicial day, unless by consent another day is agreed upon.

Section 581 provides: "If the judge finds the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability."

The allowance of bail by the judge, in this case, was made upon regular notice, and all of the proceedings relating thereto were regularly taken in conformity with the Code.

The contingency had occurred upon which the statute declares the sheriff discharged from liability. We do not think that any power exists in the court to renew his liability (*Ballard v. Ballard*, 18 N. Y. 491; *Butler's Bail*, 1 *Chitty R.* 83; *Petersdorff on Bail* [10 *Law Library*, 176], 318; *Trumbull v. Healey*, 21 *Wend.* 670; *Cornell v. Reynolds*, 1 *Cow.* 241).

The question involved is one of power, and the court have no right to speculate as to the effect of the order.

The sheriff has once been legally discharged from his

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liability, and he cannot be reinstated as a surety, except by express statutory authority. We believe that none such exists.

When the court have power to relieve a party from the consequences of a default, it is a question of discretion in the courts below, as to whether they will do so or not. The circumstances existing in this case would very well justify the action of the court, were this a proper case for the exercise of such power. The sheriff occupies the position of a surety, and his rights are *strictissimi juris*, being once discharged from his liability, it cannot be revived against his objection.

We think the order of the general term should be reversed, and that of the special term affirmed.

All concurred.

ESTATE OF ROBERT BERNEY, DECEASED.

SURROGATE'S COURT, COUNTY OF NEW YORK;
FEBRUARY, 1883.

§§ 2514, 2685

Revocation of letters testamentary. — Debtor of decedent's estate cannot move for. — He is not a "person interested in the estate of the decedent," within § 2685. — From what authority of surrogate to revoke letters is derived. — The expression "person interested in the estate of decedent" is defined in subd. 11 of § 2514, and excludes a debtor.

A debtor of the decedent's estate is not a "person interested in the estate of the decedent," within the meaning of section 2685; and he has no standing to maintain a proceeding for the revocation of letters testamentary.^[1]

The authority of the surrogate to revoke letters testamentary is derived solely from section 2685; and leave to present a petition praying for revocation is, by that section, confined to "a creditor or person inter-

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ested in the estate of the decedent."^[1] The phraseology in which this provision of section 2685 is expressed, was chosen with direct reference to the definition of "a person interested," as found in subdivision 11 of section 2514. As a creditor is not included in the definition, it was necessary, in order to extent to him the right to so move, that he should be expressly named in section 2685; but a debtor not being included in the definition of "a person interested," as given by subdivision 11 of section 2514, nor expressly named in section 2683, is not authorized to so move.^[2]

Petition by Drexel, Morgan & Co., alleged debtors of the decedent's estate, for the revocation of letters testamentary.

The facts are sufficiently stated in the opinion.

Tracy, Olmstead & Tracy, for petition.

Lord, Day & Lord, opposed.

ROLLINS, Surrogate.—This is a petition for the revocation of letters testamentary issued out of this court to the decedent's widow, Louisa Berney, on the 25th of May, 1881. The testator died at Paris, France, in the year 1874, leaving a will and codicil wherein he appointed as his executors his brother James Berney and others, and, as his executrix, Louisa Berney, his wife.

In February, 1875, certain proceedings were had in a probate court in the State of Alabama, whereby the will and codicil were there admitted to probate. James Berney was subsequently granted ancillary letters testamentary by this court. In July, 1880, he died. In May, 1881, letters testamentary were issued by the surrogate of this county to Louisa Berney, under circumstances disclosed in the moving papers. On the 22d of June, 1875, Drexel, Morgan & Co., bankers, of this city, received from Cazade, Crooks & Reynaud, claiming to be the lawful attorneys of James Berney, executor, certain United States bonds, of the face value of \$200,000, which were registered in the name of Robert

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Berney, the decedent. Louisa Berney, as executrix, lately commenced in the United States circuit court of this district, a suit against Drexel, Morgan & Co. and others for the conversion of the bonds in question. The defendants in that action sought to maintain that the letters testamentary of Louisa Berney were illegal and void, upon certain grounds which are among those alleged in the present proceeding as a cause for the revocation of such letters. It was, however, held that the validity of Mrs. Berney's appointment could not be attacked in the United States court, and it was intimated that, if the parties desired relief of that nature, they must seek it in this tribunal. The affidavits and papers which have been submitted upon the present motion are very voluminous, and raise many interesting and important issues as to the validity of the original probate in Alabama, the effect of certain proceedings in the English courts and in French tribunals, the validity of the letters issued to the executrix, etc.

In the view, however, which I am compelled to take of this case, it is necessary to pass upon only one of the questions submitted for my determination. The claim of the counsel for Mrs. Berney, that the petitioners have no such relation to this estate as empowers them to maintain a proceeding for the revocation of her letters, seems to me to be well founded. I feel compelled to hold that, within the limitations of the Code of Civil Procedure, *debtors* of an estate (and it is only as *debtors* or as *possible debtors* that these petitioners apply) have no right to make themselves parties to such a proceeding as the present.

[¹] The authority of the surrogate's court to revoke testamentary letters is solely derived from section 2685. That section empowers such a court, from which letters testamentary have been issued, to revoke the same for certain specified causes; and it also estab-

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lishes the procedure by which, in such cases, the action of the court must be invoked. It requires that, at the outset, there shall be filed a petition praying for revocation and stating the grounds upon which it is sought. Leave to file such petition is conferred by the statute upon "*a creditor, or person interested in the estate of a decedent,*" and upon nobody else.

Now, who is "*a person interested in the estate,*" within the meaning of section 2685?

Whatever might be deemed the fair interpretation of this expression, if it stood alone, its association with the term "*creditor*" seems to demand for it a narrower construction than that for which these petitioners contend, and a construction which must exclude them in the present controversy from obtaining the relief which they ask; for, as has been already intimated, the status of the petitioners is, in effect, that of debtors, or possible debtors, to this estate. Now, nobody would contend, that a debtor could, with any greater propriety than a creditor, be classed in the category of "*persons interested*." If that term, therefore, is broad enough of itself to include debtors, it is certainly broad [?] enough to include creditors; and the fact that the latter class are expressly mentioned in the statute is a forcible argument in favor of the view that neither they nor debtors were designed to be embraced in the term "*persons interested in the estate.*"

This view is confirmed by an examination of other parts of the Code.

Section 2514 is entitled, "*Definitions of expressions used in this chapter.*" "*The expression 'person interested,'*" says subdivision 11, "*when it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee,*

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assignee, grantee, or otherwise, except as creditor."

[4] It seems obvious that the phraseology of section 2685 was chosen with direct reference to this definition, and that it was deemed necessary, in order to extend to creditors the benefit of that section, to name them expressly in this statute. But debtors are neither named expressly in section 2685, nor are they included within the category of "persons interested," as defined by section 2514.

The petitioners in the present case are not "entitled, either absolutely or contingently, to share in the estate" of this decedent.

An examination of other sections of the Code confirms the views which have been declared already.

For example :

(a) Section 2636 provides that after a will has been admitted to probate, the person named therein as executor is entitled to letters testamentary thereupon, unless before the letters are granted "a creditor of the decedent, or a person interested in the estate," makes objection in the manner specified in the section.

(b) In regard to intestate estates, the Code, after prescribing who shall be cited in a proceeding for the grant of letters of administration, provides (section 2665) that any "person interested," though not cited, may make himself a party.

(c) Section 2698 declares that upon a petition for ancillary letters, creditors resident within the State shall be cited, and that "any such person" (that is, any creditor) may appear and contest the application.

There is no statutory provision under which persons whose relation to a decedent's estate is like that of these petitioners can be recognized as entitled to be heard in opposition to the grant of either original or ancillary letters testamentary, or letters of administration.

And no good reasons can be urged why claims for the

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revocation of such letters should receive more favorable consideration than would have been accorded them if they had been interposed in opposition to the original issue of such letters.

The arguments by which the petitioners's counsel seeks to maintain his contention would be almost equally effective to support a debtor's claim to become a party in a proceeding for probate of his creditor's will.

It is doubtful whether any persons, by reason of their being indebted to a decedent's estate, ever claimed the right to contest the will of such decedent. But claims of that sort have been made by creditors, and, so far as I have discovered, have been uniformly rejected by the courts (*Menzies v. Palbrook*, 2 *Curteis*, 845; *Taff v. Hosmer*, 14 *Mich.* 249; *Heilman v. Jones*, 5 *Redf.* 398; *Elme v. De Costa*, 1 *Phillim.* 173). See *Fosdick v. Delafield* (2 *Redf.* 392, 404); *Fisher v. Bassett* (9 *Leigh.*, Va., 119, 133).

This petition must be denied.

VELIE v. NEWARK CITY INSURANCE COMPANY AND ANO.

SUPREME COURT, THIRD DEPARTMENT, ULSTER COUNTY SPECIAL TERM; FEBRUARY, 1883.

§§ 481, 546.

When complaint may set forth same cause of action in different statements, or counts. — When election between such statements will not be compelled. — Reasons for allowing separate statements of the same cause of action. — Allegation sufficiently definite and certain. — Motion costs.

Where the plaintiff has more than one distinct reason for obtaining the relief demanded in the complaint, or where the plaintiff is uncertain as to the exact ground of recovery which will be established by the proofs, he may frame his complaint so as to set forth the same cause of action

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in separate statements, or counts; and he should not be compelled to elect upon which one of the statements, of the single cause of action, he will rely for recovery. [^{3, 4, 10, 11}]

The reasons for allowing, under such circumstances, a complaint to be so framed, stated at length. [^{7, 8}]

Talcott v. Van Vechten (Md. memorandum, affirmed, 25 Hun, 565), followed. ["]

Jones v. Palmer (1 Abb. 442), approved. [¹¹]

Dickens v. N. Y. Central R. R. Co. (18 How. 228); Gardner v. Locke (2 N. Y. Civ. Pro. R. 252); Comstock v. Hoeft (1 Mo. Law B. 48), disapproved so far as they would seem to limit the plaintiff, in all cases, to a single statement of the facts entitling him to relief. [^{4, 12}]

What allegation of the interest of a mortgagee in insured premises, is sufficiently definite and certain, in an action by the assignee of the mortgagor against the insurer, for loss. [^{1, 13}]

An instance of motion costs being refused to the party successfully opposing a motion, where the moving party was sustained in his practice by several adjudged cases. [¹⁴]

Motion by the defendant, the Newark City Insurance Company, to compel the plaintiff to elect upon which one of two separate statements of a single cause of action, contained in the complaint, he would rely; and, also, to compel the plaintiff to state in the complaint, with more certainty and definiteness, the interest of the defendant Thompson in the insured premises.

The facts are stated in the opinion.

G. A. Clement, for motion.

John J. Linson, opposed.

WESTBROOK, J. — The plaintiff, John W. Velie, as the assignee of Giles W. Cowley, seeks to recover of the defendant, the Newark City Insurance Company, the sum of \$1,250, with interest from January 4, 1882, that being a portion of the loss which Cowley is alleged to have sustained in the destruction by fire, of certain property of which he was then the owner.

The complaint states separately two grounds, or rea-

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sons, for the liability of the insurance company: First. That such defendant, in consideration of twenty-five dollars paid to it by said Cowley, issued to him its policy of insurance by which it agreed to insure him for the term of one year, from December 24, 1881, against loss or damage by fire, upon certain property described in the policy, and fully set out in the complaint, to the amount of \$1,250; and, Second. That the said Insurance Company, by its duly authorized agents, Messrs. Ogden and Little, of Middletown, Orange county, New York, on or about December 24, 1881, for a consideration agreed to be paid by the said Cowley, promised and contracted to insure the said Cowley against loss or damage by fire to the same property, to the extent of \$1,250, for the period of one year, and to issue its policy therefor.

[1] The complaint also avers that, by the policy of insurance, the loss, if any, was "first payable to John A. Thompson, mortgagee, as interest may appear;" that Cowley was the sole owner of the property insured and destroyed, both at the time of its insurance and of its destruction by fire on January 4, 1882, subject, however, to a mortgage thereon, owned by the defendant Thompson, to secure the payment of \$2,250; and that the insurance company has not paid the amount of the insurance to Thompson, nor has Thompson brought any suit to recover the same, and that the company refuses and neglects to make such payment.

[2] The insurance company, by this motion, asks: First. That the plaintiff shall be compelled to elect and decide whether he will rely for a recovery upon the written policy of insurance, or upon the agreement to insure and to issue a policy; and, Second. That the complaint should state more definitely and certainly the interest of Thompson in the insured property. Should the relief asked, or any part thereof, be granted?

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The question which the application to compel the plaintiff to elect between the two grounds of recovery stated in the complaint, presents, is this: When a ["] plaintiff has really two distinct and separate reasons for the obtainment of the relief demanded in the complaint, and states each one therein separately and plainly, or where, as is probably the case in this instance, the plaintiff and his attorney are somewhat uncertain as to the exact ground of recovery the proof may afford, and therefore frame a complaint for the recovery of a single claim in several distinct counts or statements, so as to meet the proof, should an election be compelled ?

["] In the discussion of this question, it must be admitted that the defendant has several reported cases which support his proposition (*Gardner v. Locke*, 2 N. Y. Civ. Pro. R. 252; *Comstock v. Hoeft*, 1 N. Y. Monthly Law Bulletin, 43; *Dickens v. N. Y. Central R. R. Co.*, 13 How. 228). Some of the reported cases were rightly decided upon other grounds than that which holds that a party plaintiff must be limited to a single statement of facts giving him a right to the relief demanded, when, in truth, there are other facts also entitling him to such relief, or when more than one statement is necessary to meet any contingency of the trial. The soundness

["] of the rule compelling an election has never favorably impressed me, and reflection upon the present ["] motion has fully confirmed those impressions. In the discussion of a legal problem there generally are several reasons tending to a certain conclusion, all of which counsel in argument would present; and so, in the trial of a cause, there generally are distinct and separate lines of fact tending to give the same one relief asked, which a careful pleader should embody in the complaint. It would seem to be absurd for a judge to limit counsel to the presentation of a single reason

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upon the argument of a legal proposition, and, to me at least, it seems equally absurd to limit a party to the statement in his complaint of one line of facts establishing his right of recovery, when he has really several, or when the court can plainly see, as it can in this case, that different averments are proper to meet an emergency of the trial, which cannot be foreseen prior to its occurrence. Take, for instance, the case of a party who is the heir at law of a deceased testator, seeking, under section 1537 of the Code, to partition and to recover property held under an alleged will. The reason which he assigns in his complaint for a recovery is, that the apparent devise, under which the property is held, is void, because, First : The testator was legally incompetent to make a valid will. Second : That the instrument, alleged to be a will, was procured by fraud and undue influence ; and Third : That the execution thereof was insufficient and defective. In a case like the one just put, or in one like that before us, in which it is often very difficult to decide whether a policy of insurance has actually been issued, or whether there has been only an agreement for insurance and for a policy, can any good reason be adduced for compelling the plaintiff, in advance of a trial, or even at the trial, to elect upon what ground he will stand, and present his case ? If either or both are tried, the proof upon each ground of recovery stated may be close and conflicting. A jury of twelve men may be divided in opinion as to which one is established, while all may unite, some for one reason and some for another, in the conclusion that the plaintiff is entitled to recover. If, under such circumstances as have been stated, an election is compelled, justice may fail and wrong succeed. It is no answer to this argument to say, that, if the plaintiff is unsuccessful, another action can be brought setting up a ground of recovery not pressed upon the first trial. The right to

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bring a second action for the same subject-matter, though for a different cause, is more than doubtful ; but even though the judgment in the first action is no bar to the second, why should a party fail in the relief to which he is in fact entitled, and which he would have obtained on the first trial, if he had been allowed to state his whole case in the complaint, and be subjected to the delay, cost and vexation of a new trial, by the adoption of a rule which limits the complaint to the statement of a single reason or ground for a recovery. The second trial, too, might fail, if the issue was limited by the court compelling an election, because twelve men could not agree to sustain a recovery upon that single reason or ground. The practical effect of the rule is obvious. A plaintiff may often fail to obtain that which is his due, because he presents his grounds of recovery singly, when he might succeed if they were all presented in one suit ; and often, though he may succeed in the end, he has suffered in costs, delay and vexation, which could and should have been avoided. A defendant may present as many defenses as he has to a single claim, though, on the face of the answer, they may seem to be inconsistent, and no good reason can be given, why a plaintiff may not present by his complaint as many different statements of distinct lines of fact as he has, or as he supposes himself to have, giving him the right to the relief which he asks. It, undoubtedly, is the interest of the defendant to limit the plaintiff in every action, as is now sought to be done by this motion, but, as in the administration of justice every argument should be weighed and every pertinent fact considered, it cannot be conceded that, on the trial of an issue of fact, a plaintiff should be limited in his facts to a single ground of recovery, any more than upon the discussion of a legal problem he should be limited to the statement of a single argument.

[1] ment of a single argument.

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The point which has been discussed is not new to [¶] the judge writing this opinion. In *Talcott v. Van Vechten*, the plaintiff sought to make the defendant liable for a debt due the former from "The Talcott Iron Company." The complaint alleged in two separate statements, two distinct lines of fact tending to make the defendant liable for that demand. On a motion made at special term to compel the plaintiff to elect between the two, such motion was denied upon the ground (stated in a memorandum), that it was "the right of the plaintiff to set forth all the facts which made the defendant liable," and that the statement of "two distinct grounds of liability" for "only one cause of action" was proper. On appeal to the general term of the third department, this decision was affirmed (*Talcott v. Van Vechten*, 25 Hun, 565, memorandum merely). In this department, the question argued must, therefore, be deemed settled.

[¶] Perhaps one other thought on this point may be separately added, though it has already been suggested. It is impossible for a party or his counsel to know in advance of a trial the exact facts of a case. It is often difficult in an action like the present to determine, whether there was an actual insurance or a simple agreement to insure and deliver a policy. There may be danger in presenting the case upon a single ground, while a recovery may be certain if the plaintiff is allowed to present both. Many other cases of like uncertainty will readily recur to the mind of a practicing lawyer. Why, then, it may well be asked, unless justice is to be hampered, should a party be compelled to do that which may result in his defeat, when justice and right [¶] require his success? So to construe and interpret the Code defeats its entire object, which was to simplify and make easy, and not to perplex the administration of justice. Precisely this view of this

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question was taken many years ago by Judge COWLES, with the concurrence of the judges of the general term, in *Jones v. Palmer* (1 Abb. 442), and it seems to be so clearly right as to preclude discussion.

[^a] But a single word need be added upon the second application, that to compel a more definite statement as to the interest of John A. Thompson in the insured property. It is difficult to see how the complaint could be made more explicit in that particular. It is distinctly stated that he held a mortgage at the time of the fire to secure the payment of \$2,250. What effect, if any, this fact may have upon the rights of the plaintiff is not before me, and is not determined. The allegation is definite, certain and clear, and cannot be made more so by additional averments.

[^b] The motion of the defendant must be denied, but without costs, as the moving party is sustained in its practice by several adjudged cases.

STAMM, RESPONDENT, v. BOSTWICK, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM;
MAY, 1883.

§§ 603, 604, 1638.

Determination of claim to real property. — Plaintiff entitled to possession during pendency of action.—Injunction may be granted to restrain interferences with possession. — Under what circumstances plaintiff not affected by judgment in favor of defendant, in an action against plaintiff's tenants.

The provisions of the Code controlling the proceedings in an action to compel the determination of a claim to real property clearly contemplate that the plaintiff should be continued in possession during the pendency of the action; [¹] and where it appears that the defendant not only designed to interfere, but was actually interfering, with the pos-

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session of the plaintiff, the case is, then, one in which the disturbance of the plaintiff's possession would produce injury to him during the pendency of the action, and an injunction may be granted under sections 603 and 604 of the Code.* [L]

Under what circumstances the plaintiff, in an action to compel the determination of a claim to real property, will not be affected by a judgment, for rent, recovered by the defendant, in an action by him against the tenants of the plaintiff, occupying the premises in controversy. [T]

(Decided June 1, 1883.)

Appeal by defendant from an order of the special term, denying a motion to vacate an injunction order enjoining the defendant from interfering with the plaintiff's possession of the real property in controversy, during the pendency of the action.

The action was brought in March, 1883, to compel the determination of a claim to certain real property situated in the city of New York. The plaintiff, being the father of one Elizabeth Stamm, deceased, claimed to be her heir at law, and the complaint brought the case within the requirements of section 1638.

The plaintiff, on an affidavit alleging that the defendant had brought one summary proceeding to dispossess the tenants of the plaintiff, occupying the premises, on the ground that they held over and continued in pos-

* Section 1681 of the Code provides that, during the pendency of an action specified in title I of chapter XIV (§§ 1496-1688), there may be issued, in case of waste committed upon, or other damage done to, the property in controversy, a restraining order which, in effect, amounts to an injunction. But this remedy is merely cumulative, for the last sentence of section 1681 provides that: "This section does not affect the plaintiff's right to a permanent or a temporary injunction in such an action." Mr. Troop, in a note to section 1681 of his edition of the Code, says: * * * "The last sentence has been added to prevent the possibility of a construction, which would make this section supersede, in the cases to which it applies, the general provisions of chapter 7, title 2, *ante*. It is intended only to afford a cumulative remedy; which is more summary and simple than the remedy by injunction; but doubtless cases will occur, where the latter is preferable."

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session after the expiration of their term, which proceeding had been dismissed (upon a point not necessary to be here stated), and had thereafter commenced another such proceeding upon the same ground, and that the last mentioned proceeding was still pending ; and alleging further, that the defendant was utterly without property and irresponsible, and that the plaintiff feared that the defendant would continue to vex and harrass him and his tenants with other proceedings, and by trick and device endeavor to obtain possession of the premises, and that, if the defendant should obtain possession, the plaintiff would be put to an action of ejectment to recover possession of the same, to his great loss and irremediable injury, procured an injunction order enjoining the defendant, during the pendency of the action, from interfering with plaintiff's possession of the premises and restraining him from commencing and prosecuting any proceeding or actions to obtain possession of the premises. The defendant moved to vacate the injunction on an affidavit admitting the bringing of the summary proceedings, but denying the other charges, and alleging himself to be, by reason of alienage on the part of the plaintiff, the heir at law of the said Elizabeth Stamm, and setting forth that, in November, 1881, in the court of common pleas, he had as such heir at law brought an action against the tenants occupying the premises, who had attorned to the plaintiff, to recover the rent of the premises, that in such action he had alleged himself to be the heir at law by reason of the plaintiff's alienage, and that the tenants in their answer had denied his heirship, and that the action had been tried in February, 1883, and that he had recovered a verdict against the tenants, and that from the judgment entered thereon no appeal had been taken, and that this plaintiff had been present during at least a part of the trial of the action.

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At special term, the defendant's motion to vacate the injunction was denied, but an order was thereon entered requiring the plaintiff, during the pendency of the action, to deposit the rents of the premises with the Union Trust Company, to the credit of the action, with leave to the plaintiff to pay therefrom the insurance upon the premises, taxes, water rates and the costs of keeping the premises in ordinary repair.

Lewis Johnson (*Johnson & Tilton*, attorneys), for appellant:

In the court of common pleas, the plaintiff has had his day in court, and this court should not sit in review upon the judgment of the common pleas which has tried the question of title, as being necessarily involved in the action for rent; and the effect of that judgment is virtually to put the defendant in possession, by adjudging him entitled to the rents. By the order appealed from, the defendant, is, in effect, deprived of the benefit of that judgment, without any pretense of the existence of fraud or collusion.

The injunction is granted, in part, to restrain the summary proceedings begun by the defendant against the tenants occupying the premises. As all of the equities are denied, the injunction should have been vacated. See note on Injunctions in Summary Proceedings, 1 *Civ. Pro. R.* (1 *McCarty*), 425-443.

Mere fear of having his possession disturbed is no ground for an injunction by a person not a party to the summary proceeding (*Aaron v. Baum*, 7 *Rob.* 340, S. C., 37 *How.* 237; see *McAdam on L. & Tenant* [2d ed.], 670), and a third person has no right to restrain the proceeding. *Many v. James*, 2 *Daly*, 437, S. C., 37 *How.* 52. The only grounds upon which an injunction can be granted to restrain the proceeding are fraud, collusion, want of jurisdiction or the existence of equit-

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able rights which cannot be protected in the proceeding. Grissler *v.* Stuyvesant, 67 *Barb.* 77; Seebach *v.* McDonald, 21 *How.* 224; Sherman *v.* Wright, 49 *N. Y.* 227; Smith *v.* Moffat, 1 *Barb.* 65; Duigan *v.* Hogan, 1 *Bosw.* 645, S. C., 16 *How.* 164.

Paul Fuller (Coudert Brothers, attorneys), for respondent:

The injunction was properly granted under section 604. It is held that, in a proper case, the court has power to restrain summary proceedings, by injunction, Landon *v.* Supervisors of Schenectady Co., 24 *Hun.* 75, and cases cited; Jessurun *v.* Mackie, *Id.* 624; Knox *v.* McDonald, 25 *Id.* 268; Crawford *v.* Kastner, 26 *Id.* 440. Although as between landlord and tenant, the power will not, at all times, be exercised, still in the case at bar, where the defendant seeks indirectly to oust the plaintiff through vexatious proceedings against his tenants, instead of employing the direct method of an action of ejectment against the plaintiff, the person in possession, and when the plaintiff resorts to a comprehensive action to settle definitely the dispute, he is entitled to have the summary proceedings restrained and the jurisdiction transferred to a competent tribunal, and all the rights determined in one action to which he is properly a party.

By the Court. — DANIELS, J. — This action is brought under the authority of section 1638 of the Code of Civil Procedure, which authorizes a person who has been in actual possession of real estate, or whenever he and the person from whom the estate has been derived have held such possession for a term of three years under the circumstances therein mentioned, to maintain an action to compel the determination of a claim to the [1] property adverse to that of the plaintiff. And it is clearly contemplated by the provisions enacted to

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control the proceeding in the action, that the plaintiff should be continued in the possession during the pendency. For that reason, where there is danger of his possession being unlawfully disturbed or molested in the meantime, an injunction may be issued under [¶] section 603 of the Code of Civil Procedure. For the case will then be one where the disturbance of his possession during the pendency of the suit would produce injury to him. And it appears by the affidavit sustaining the application for the injunction, that the defendant not only designed, but was actually interfering with the possession of the premises in controversy. And as that has not been denied, the case was clearly one for an injunction, within the section last referred to and that immediately following it. The action is not within the cases which have been decided relating to the right of the tenant to restrain by injunction summary proceedings brought to recover possession of demised premises, for that was not its principal object. The purpose of the suit was to determine the conflicting claim of the defendant to the property in controversy, and the restraint imposed upon his proceeding was incidental only to the complete accomplishment of the purposes of the action, and for that end the injunction was entirely proper. It was also carefully guarded by the direction requiring the deposit of the rents with the Union Trust Company to the credit of the action, and accordingly no possible injury can be sustained by the restraint imposed [¶] upon the defendant. It was claimed in his behalf that, as a recovery of rent was had in his favor in the court of common pleas against one of the tenants, and the plaintiff was present in court during a portion of the trial, his claim of title had, in that manner, been virtually decided against him. But this position cannot be maintained, for he was not a party to that action, and the mere circumstance that he was present observing

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the proceedings, without the right to produce witnesses or cross-examine those sworn on behalf of the defendant, will not affect him by the result of the trial.

The order in the case should be affirmed, together with \$10 costs, besides disbursements.

DAVIS, P. J., and BRADY, J., concurred.

METROPOLITAN ELEVATED RAILROAD COMPANY v. MANHATTAN RAILWAY COMPANY; N. Y. ELEVATED RAILROAD COMPANY ET AL.

N. Y. COMMON PLEAS, SPECIAL TERM; JULY, 1883.

§§ 609, 629.

Vacating of injunction order. — Construction of § 629, as amended by Chap. 404, Laws of 1888. — What prior acts on part of defendant are equivalent to notice to vacate under the amendment. — When application to vacate under amendment is equivalent to notice "upon the hearing." — Amendment makes no distinction between injunctions ad interim and pendentes lite. — Meaning of the amendment. — When defendant not required to give two undertakings. — Amendment is mandatory. — When injunction must be vacated. — Amendment substitutes pecuniary indemnity for previous equitable restraint of injunction. — What is duty of judge, when application is made under amendment. — Amount and form of undertaking. — When, it seems, plaintiff may have additional security. — What is impliedly admitted by defendant when application is made to vacate.

Where the plaintiff obtained an order to show cause why an *ad interim* injunction therein contained should not be continued during the pendency of the action, and the defendants appeared and opposed the motion on such order; but before the decision thereof, section 629 of the Code was amended by Chapter 404, Laws 1888, and the defendants then applied to vacate, under the amendment.* — Held, that the appearance

* The amendment of section 629, made by Chapter 404 of the Laws of 1888, consists in the addition of the matter here printed in italics:

"§ 629. Upon the hearing of an application, upon notice, to vacate or

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and opposition of the defendants must, within the meaning of the amendment, be regarded as having the same force and effect as if the defendants had applied upon notice to vacate the injunction;["] and that their application to vacate was, within the meaning of the amendment, an application "upon the hearing."["]

The amendment makes no distinction between injunctions *ad interim* and *pendente lite*; and its meanings is, that, if the wrong or injury is reparable and capable of being adequately compensated for in money, the party enjoined may be relieved from the restraint by indemnifying the other party against any possible loss or injury; and with respect to the effect of the indemnity, it makes no difference whether the injunction be *ad interim* or *pendente lite*; being once given, it puts an end to all further proceedings upon the application for the injunction.[*,*,*] Accordingly, where the defendant has given an undertaking to vacate an *ad interim* injunction, the amendment will not be so construed as to require the right to an injunction *pendente lite* to be determined, and then, should it be held that the plaintiff is entitled thereto, to require the defendant to give a second undertaking of the like effect and amount, in order to remove the restraint.[*,*]

The amendment is mandatory, and the judge *must*, where the alleged wrong or injury is reparable and capable of being adequately compensated for in money, vacate the injunction upon the execution of the undertaking therein provided for;["] a pecuniary indemnity having, in such cases, been substituted for the previous equitable remedy of an injunction [*].

When an application is made under the amendment, it is the duty of the judge to determine whether or not the alleged wrong or injury which the injunction, *ad interim* or otherwise, was granted to prevent, can be compensated for in money;["] and, if it can be adequately compensated for in money, to fix the amount of the undertaking, which must neces-

modify an injunction order, the court or judge may require a new undertaking in the same or in a different sum, to be given by the plaintiff, with the like sureties, and to the like effect as upon granting an original order. The persons executing the new undertaking become liable thereon as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer.

- Upon such hearing the court or judge must, where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order."

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sarily be such a sum as would cover any pecuniary injury which the party obtaining the injunction could sustain by the removal of the restraint and the happening of the injury, to prevent which the injunction was imposed.^[1,2] The form of the undertaking will be such as to indemnify against any loss or injury that may be sustained from the time of vacating the injunction to the time of the trial and judgment in the action.^[3,4] And it seems, that if the defendant should desire a postponement of the trial, and that, by reason thereof, the amount originally fixed by the undertaking would be insufficient to cover the loss or injury which might afterward result therefrom, the court could exact as a condition of the postponement, that the plaintiff should have such further security as would cover any such possible loss or injury.^[5]

In making an application under the amendment, the defendant may be said to admit impliedly the right to the injunction and to continuance thereof, in the same sense that a defendant concedes the right to an order of arrest when he gives bail instead of moving to discharge the order.^[6]

How knowledge as to the character of the alleged wrong or injury, and the extent of the apprehended loss or damage, is to be derived by the judge.^[10,11]

Motion by the defendants, under section 629 of the Code, as amended by Chapter 404, Laws 1883, to vacate an injunction upon the defendants executing the undertaking specified in said amended section.

On April 2, 1883, by an order to show cause containing an injunction restraining the defendants until the hearing and decision of the motion upon such order, the plaintiff moved that the defendants show cause why said injunction should not be continued during the pendency of the action, and the defendants be thereby restrained from carrying into further effect a certain agreement known in the elevated railway litigations as the "merger agreement," whereby the plaintiff united with the defendants for the purpose of operating the elevated railway system in the city of New York, and for a division of the profits arising therefrom, which agreement the plaintiff now alleged had not been submitted to, and ratified by, its stockholders, and had been made and entered into by its directors

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without authority, and to its loss and injury. The defendants opposed the motion upon the order to show cause, which was argued in April, 1883; but, before a decision had been made thereon, section 629 of the Code was amended by Chapter 404 of the Laws of 1883, passed May 12, 1883, which amendment took effect immediately. Thereafter, on June 15, 1883, the defendants moved, by order to show cause, to vacate the injunction contained in the plaintiff's order to show cause, upon the giving of the undertaking specified in the amended section, on the ground that the alleged loss or injury was not irreparable, and was capable of being adequately compensated for in money.

The other facts are sufficiently stated in the opinion.

David Dudley Field & Wm. A. Duer (*Deyo, Duer & Bauerdorf*, attorneys), for defendants and motion.

Barlow & Olney, for plaintiff and opposed.

DALY, Ch. J.—My opinion upon the following matters, though substantially expressed upon the oral argument, I put in writing, that it may appear precisely what the decision has been in respect to them, especially as they are preliminary to the final question that has been argued, which is, the effect of the filing of the undertaking and the vacating of the injunction as provided for in the recently enacted amendment of the Code, upon the previous motion for the injunction, which has been argued and not decided; a question upon which I have felt much embarrassment and doubt.

These are my conclusions upon the preliminary matters above referred to:

[1] First. As the defendants were required by the order served upon them to show cause why the injunction therein granted provisionally, or *ad interim*, should not be continued during the pendency of the

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action; and as they appeared upon the return day of the order and opposed the application, their so appearing and opposing must, within the meaning of the provision in the recent amendment, be regarded as having the same force and effect as if they had applied upon notice to vacate the injunction.

[¶] Second. As the motion of the plaintiff to continue the *ad interim* injunction until the trial and judgment is, though argued, still under consideration, the application of the defendants now to vacate the injunction upon filing the undertaking provided for by the statute is, within the meaning of the new amendment, an application "upon the hearing."

Third. The alleged wrong and injury complained of is capable of being adequately compensated for in money, as it is the withholding from the Metropolitan road of the quarterly payments provided for in the original lease made by the directors, with the approval of the stockholders, and consists in the difference between the amount payable quarterly under that lease and the reduced amount payable quarterly under the October agreements, which reduced amounts the Manhattan company have so far offered to pay. The extent, therefore, of the injury which the plaintiffs can sustain by vacating the injunction is the amount of that difference from the time of the service of the injunction until the action can be tried and the rights of the parties finally determined by a judgment.

An equity term will be held next October, and another in the following December, in either of which the cause can be tried. An undertaking, therefore, sufficient to cover the amount of this difference from the service of the injunction to the first of January next, which difference, it is agreed, would amount to \$190,000, is the proper measure of the plaintiff's possible loss, up to that period ; and sufficient, within the provisions of the

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new amendment, to secure to the plaintiff adequate compensation in money for any injury it may sustain by the vacating of the injunction.

[¶] At the equity term in October or December, the plaintiff can compel the defendants to go to trial, or if the court should allow the trial, on the defendants' application, to be postponed beyond these terms, it will be in the power of the court to exact as a condition that the plaintiff should have such further security as would cover any possible loss or injury to them thereafter.

Fourth. The form of the undertaking and the amount of it is, according to the provisions of the amended section, to be such as the court or judge before whom

[¶] the application is made shall direct. My direction is that the undertaking shall be in such a form as to indemnify the plaintiff against any loss or injury they may sustain from the time of the vacating of the injunction to the trial and judgment, and that the amount of the undertaking shall be \$196,000. The three sureties named by the defendants, who are to execute the undertaking, are satisfactory; and upon the filing of such an undertaking, the defendants will be entitled to an order vacating the injunction.

The undertaking being filed and the injunction vacated, the question arises as to the effect of the vacating of it upon the motion to continue the injunction during the pendency of the action, which has not been decided.

The plaintiff claims that the only effect is, that the *ad interim* injunction is vacated, which leaves the motion still to be decided; that is, that it remains still to be decided, whether the *ad interim* injunction, which has been vacated, shall, in effect, be continued during the pendency of the action. They insist that the distinction must be recognized that the injunction *ad interim* is not an injunction restraining the execution of the agreement *pendente lite*, which is what they moved

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for ; and that it is my duty, notwithstanding that the *ad interim* injunction is vacated, to go on and decide upon the motion whether or not the plaintiff is entitled, during the pendency of the action, to have the restraint continued ; the counsel for the plaintiff conceding that if I should decide that they are, and grant such an injunction, that then the defendants would have the right, under the recent amendment, to move to vacate that injunction, upon giving the undertaking provided for in the amendment ; which is, in effect, that there may be two undertakings under this recent enactment — one upon vacating an injunction during the pendency of the motion, and another on vacating an injunction during the pendency of the action. In brief, they claim that, under this section as the matter now stands, there is but one injunction which can be vacated.

I was much impressed with this objection, as the only injunction is the one I granted until the hearing of the motion ; but, after a full consideration of this difficulty and a careful examination of the new provision in the Code, I am satisfied that the construction which the plaintiff puts upon it, and which, if they were entitled to a continuation of the injunction, would, if the defendants want the restraint wholly removed, involve the necessity of their giving two undertakings, both of the like effect and amount, cannot be correct. The amendment makes no distinction between injunctions *ad interim* and injunctions *pendente lite*. What this new provision obviously means is, that if the wrong and injury complained of is reparable and capable of being adequately compensated for in money, the party enjoined may be relieved from the restraint imposed, by indemnifying the other party against any possible loss or injury he may sustain ; and this indemnity being given, it can make no difference

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whether the injunction was *ad interim* or to continue until there was a judgment.

[⁸] The provision is mandatory, that the judge or court "must," unless the alleged wrong or injury is irreparable and incapable of being adequately compensated in money, vacate the injunction upon the

[⁹] filing of the undertaking provided for. It is, therefore, the duty of the judge, when an application is made to him under this new provision, to determine, first, whether the alleged wrong or injury which the injunction, provisional or otherwise, was granted to

[¹⁰] prevent, can be compensated in money. What the alleged wrong or injury is will appear by the complaint, or the exact nature or effect of it may appear more particularly by the affidavits upon which the preliminary injunction was granted, or by affidavits read

[¹¹] by either party upon the application to vacate. If he determine that it can be adequately compensated by money, then, the duty is imposed upon him to fix the amount of the undertaking, which must necessarily be such an amount as would cover any pecuniary injury which the party who obtained the injunction could sus-

[¹²] tain by removing the restraint which was imposed to prevent that injury. This implies on the judge's

part a knowledge, acquired from the facts before him, of the nature and extent of the injury apprehended; and, if it should happen, what would be an adequate compensation for it in money; which amount, in my opinion, it is his duty to require in the undertaking, within the plain meaning of this new provision. Having done this, and directed both in the form and by the amount of the undertaking what will indemnify the plaintiff for "the alleged wrong or injury," the undertaking so directed is filed, and the injunction order vacated, which, it appears to me, puts an end to all further proceedings upon the application for an

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[¹³] injunction ; a pecuniary indemnity having, in the manner provided for in the statute, been substituted for the previous equitable remedy by injunction.

[¹⁴] If all this has been done, then the plaintiffs have been indemnified against all possible loss or injury that may happen to them, from that time to the determination of the action, by the defendants doing any of the acts which they were restrained from doing ; and I wholly fail to see why there should, or how there can, be any further proceeding in the motion for the injunction.

If a judge should hold, on the return of an order to show cause, that there was no ground for the injunction which he had granted *ad interim*, that would be the end of the motion for the continuation of it. The decision would be that the motion must be denied and the injunction vacated. The effect is analogous, when the judge holds, under this new provision, that the wrong and injury complained of can be compensated in money, and that the *ad interim* injunction he granted must be vacated upon the defendants filing an undertaking in the amount which the judge directs ; and the defendants, in making such an application, [¹⁵] may be said impliedly to admit the right to the injunction and to the continuation of it, in the same sense that a defendant concedes the right to make the arrest when he gives bail, instead of moving to discharge it.

[¹⁶] In my opinion, when the indemnity contemplated by the statute is given, it puts an end alike to the injunction *ad interim*, and to the motion to continue it. After a very careful examination and full reflection, I can come to no other conclusion. In doing so, I fully appreciate the reason for the earnestness with which the plaintiff's counsel has urged that I should still go on and decide the motion. The question discussed in it, the

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validity of the October agreement, is the main question in the action, having other questions involved with it, as to the plaintiff's right to impeach the validity of these agreements.

A great deal of time has been devoted to the preparation of the argument upon both sides. Many days were occupied by the oral argument. Voluminous briefs were afterwards printed and submitted, embracing a very large citation of authorities. Under these circumstances, the plaintiff feels strongly that so much time should be lost, labor devoted and expense incurred, without any result, by having the motion arrested and put an end to, under a provision in the Code, which took effect as a law after the motion had been argued. But the statute is imperative; the further consideration of the motion depends upon its construction, and the interpretation I have put upon it is, in my judgment, the correct one.

GRIBBON AND ANO., APPELLANTS, v. FREEL AND ANO., RESPONDENTS.

COURT OF APPEALS; JUNE, 1883.

§§ 416, 638, 723, 788, 3165.

Service of summons where warrant of attachment has been granted.—Time computed according to § 788.—When last day falls on Sunday, service may be made on day following the last day.—Error in summons, as to defendant's time to answer, is mere irregularity.—May be amended nunc pro tunc.—§ 723 applies to marine court.—Jurisdiction where provisional remedy has been granted.

Where a warrant of attachment has been granted in the action, and the last day upon which service of the summons can be made under section 638 of the Code falls upon Sunday, the time may be computed according to section 788, and service made upon the following Monday (the thirty-first day after the day upon which the warrant was granted) is a compliance with section 638. [']

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An error in the summons, as to the time within which the defendant must serve a copy of his answer, does not make the summons a nullity, but is a mere irregularity which may be amended *nunc pro tunc*, under section 728. [⁴]

Section 728 applies to the marine court. [⁵]

Under section 416, the court acquires conditional jurisdiction from the time of granting a provisional remedy. [⁶]

(Decided June 26, 1888.)

Appeal by plaintiffs from an order of the general term, N. Y. Common Pleas, reversing an order of the general term, N. Y. Marine Court, affirming an order of the special term, which denied a motion on the part of the defendant Freel, to vacate a warrant of attachment against the property, and which allowed the plaintiffs to amend the summons *nunc pro tunc*.

The first sentence of section 3165 of the Code provides that, "The summons, in an action brought in the court [N. Y. Marine], must state the time, within which the defendant must serve a copy of his answer, is six days after the service thereof, exclusive of the day of service, except in one of the following cases." By subdivision 2 of this section, it is required, where service is to be made by publication, that "the summons must state that the time, within which the defendant must serve a copy of his answer, is ten days after service thereof, exclusive of the day of service," etc. The summons issued by the plaintiffs required the defendants to answer within six days instead of within ten days.

The facts are stated in the opinion.

William Blaikie, for appellants:

Cited *Watkins v. Stevens*, 3 *How.* 28; *Clapp v. Graves*, 26 *N. Y.* 418; *Holmes v. Russel*, 9 *Dowl. P. C.* 487; *McCoun v. N. Y. C. & Hudson R. R. Co.*, 50 *N. Y.* 176, 179; *Bander v. Covill*, 4 *Cow.* 60; *Bradbury v. Van Nostrand*, 45 *Barb.* 194; *Potts v. Compton*, *Appendix to McAdam's Marine Ct. Pr.* 4.

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Adolph Ascher, for respondents:

Cited Blossom *v.* Estes, 22 *Hun*, 472, affirmed 84 *N. Y.* 614; Donnell *v.* Williams, 21 *Hun*, 216; Mojarietta *v.* Saenz, 80 *N. Y.* 547; Bogart *v.* Swezey, 26 *Hun*, 463; Taylor *v.* Troncoso, 76 *N. Y.* 599; Marvin *v.* Marvin, 75 *N. Y.* 240.

EARL, J.—A summons for the commencement of this action was issued out of the marine court of the city of New York, in which the defendant Freel, who was a non-resident of the State, was required to answer in six days. The summons was in the form generally required to be used in that court (*Code*, § 3165). Thereafter, on the 16th day of June, 1882, the plaintiffs obtained a warrant of attachment from the same court, by virtue of which Freel's property within this State was attached; and, on the fourteenth day of July thereafter, they procured an order for the publication of the summons against him. Subsequently, on the seventeenth day of July, the summons was personally served on him without the State.

Thereafter Freel, by counsel who appeared specially for that purpose, made a motion to vacate the attachment, on the grounds that the summons was not served within thirty days after the granting of the attachment, and, also, that it required him to answer within six days instead of ten days, and the motion was denied at the special term of the marine court, and an order was made that the summons be amended *nunc pro tunc* as to Freel, so that it should read that the time within which to answer and serve a copy of his answer on plaintiffs' attorney be ten days, and that the summons have the like force and effect as if it had originally read ten days instead of six, and that the service of a copy of the order on Freel's attorney be sufficient service and notice to him that the summons had been so amended, and

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that he have until the expiration of ten days to serve his answer. From the order of the special term, he appealed to the general term of the marine court, where it was affirmed. He then appealed to the court of common pleas, where the orders of the marine court were reversed. The plaintiffs then, by leave of the common pleas, brought this appeal.

We are of opinion that the summons was served [] in time. The day on which the service was made, was the thirty-first day after the granting of the attachment. But the sixteenth day of July was Sunday, and hence the service on the next day was in time under section 788 of the Code, which provides that if the last day, in such a case, occurs on Sunday, it must be excluded from the count. Thus, the service was made within thirty days as required by section 638. Subdivision 2 of section 3165 of the Code provides that: "When an order directing personal service of the summons without the city of New York, or by publication, is granted, the summons must state that the time, within which the defendant must serve a copy of his answer, is ten days after service thereof, exclusive of the day of service." This summons should, therefore, have required the defendant to answer within ten days [] instead of six. The marine court obtained jurisdiction of the action from the time of the granting of the attachment (*Code*, § 416). That section provides that: "A civil action is commenced by the service of a summons. But from the time of the granting of a provisional remedy, the court acquires jurisdiction and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional and liable to be divested, in a case where the jurisdiction of the court is made dependent, by a special provision of law, upon some act to be done after the granting of the provisional remedy."

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The claim of the defendant is, that the court lost jurisdiction, because the summons requiring the defendant to answer within ten days was not served upon him within the time required by the statute; that the service of a summons requiring him to answer within six days was to be treated as if no summons whatever had [¶] been served upon him. But the summons was not an absolute nullity. The insertion of six days instead of ten was an irregularity merely. The defect could have been waived by the general appearance of the defendant, or consent, express or implied. A judgment entered by default, after the service of such a summons, would not have been absolutely void, but simply irregular or erroneous, to be corrected by motion or by appeal (*Watkins v. Stevens*, 3 *How. Pr.* 28; *Clapp v. Graves*, 26 *N. Y.* 418; *McCoun v. N. Y. C. & Hudson R. R. Co.*, 50 *N. Y.* 176; *Bradbury v. Van Nostrand*, 45 *Barb.* 194; *Holmes v. Russell*, 9 *Dowl. P. C.* [¶] 487). The summons was, therefore, amendable under section 723 of the Code, which provides that: "The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a [¶] mistake in any other respect." That section applies to the marine court, which is a court of record, and gave ample power to that court to amend the summons.

We are, therefore, of the opinion that the order of the court of common pleas should be reversed, and that of the marine court affirmed, with costs.

All concurred, except ANDREWS, J., absent, and RAPALLO, J., not voting.

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*(None of the amendments made by Chap. 397 of the Laws of 1882
invalidated or impaired the effect of any proceeding taken before the
passage of the act [July 1st, 1882]; and the amendment to § 1019
does not apply to a reference made before the act took effect.)*

*(None of the amendments made by Chap. 399 of the Laws of 1882
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